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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-595

In the Matter of

Amendment of Section 73.202(b),	RM-7042
Table of Allotments,	RM-7094
FM Broadcast Stations.	
(Clarinda, Iowa, Maryville, Missouri,	
Omaha, Plattsmouth and Fairbury,	
Nebraska)	

NOTICE OF PROPOSED RULE MAKING AND ORDERS TO SHOW CAUSE

Adopted: December 7, 1989; Released: January 2, 1990

By the Chief, Allocations Branch:

1. The Commission has before it two inter-related petitions for rule making. Nodaway Broadcasting Corp. ("Nodaway"), licensee of Station KNIM-FM, requests the substitution of Channel 257C3 for Channel 257A at Maryville, Missouri, and the modification of its license accordingly. Diane N. Landen ("Landen"), permittee of a new FM station on Channel 290A at Omaha, Nebraska, requests the substitution of Channel 290C2 for Channel 290A and the modification of her construction permit (BPH-870918MP) to specify the higher powered channel. In order to accomplish the upgrade at Omaha, Landen further requests the following substitutions: (1) Channel 295A for unoccupied but applied for Channel 293A at Plattsmouth, Nebraska;[1] (2) Channel 257C2 for Channel 291C2 at Clarinda, Iowa, and the modification of Station KMA-FM's license; (3) Channel 258C1 for Channel 257C1 at Fairbury, Nebraska, and the modification of Station KUTT's license accordingly; and (4) Channel 246C3 for Channel 257A at Maryville, Missouri, in lieu of Nodaway's proposed Channel 257C3. Landen states that Steven C. Mickelson, President of Nodaway, has authorized Landen to state its support for the allotment of Channel 246C3 in lieu of Channel 257C3 at Maryville. Landen states that the allotment of Channel 290C2 to Omaha would enable the station to substantially expand its coverage area, thereby improving service to the public and promoting spectrum efficiency while also permitting the Maryville station to upgrade to Class C3 operation. Therefore, she requests that her petition be consolidated with, and substituted for, Nodaway's pending request.

2. We believe the public interest would be served by proposing the substitution of Channel 290C2 for Channel 290A at Omaha, Nebraska, Channel 295A for Channel 293A at Plattsmouth, Nebraska, Channel 257C2 for Channel 291C2 at Clarinda, Iowa, Channel 258C1 for Channel 257C1 at Fairbury, Nebraska, and Channel 246C3 for Channel 257A at Maryville, Missouri, since it could enable Station KNIM-FM at Maryville, Missouri, and the newly authorized station at Omaha, Nebraska, to expand their coverage areas. Channel 290C2 can be allotted to Omaha, Nebraska, with a site restriction of 24.8 kilometers (15.4 miles) southeast to accommodate petitioner's desired transmitter site. Channel 246C3 can be allotted to Maryville, Missouri, and can be used at Station KNIM-FM's present transmitter site. Channel 258C1 can be allotted to Fairbury, Nebraska, with a site restriction of 15.9 kilometers (9.9 miles) northeast to avoid a short-spacing to Station KHAZ, Channel 258C1, Hays, Kansas, and avoid a conflict with the proposed allotment of Channel 257C2 at Clarinda, Iowa.[2] Channel 295A can be allotted to Plattsmouth, Nebraska, with a site restriction of 5.1 kilometers (3.2 miles) east to avoid a short-spacing to Stations KTPK, Channel 295C, Topeka, Kansas, and KEZG, Channel 297C1, Lincoln, Nebraska. Channel 257C2 can be allotted to Clarinda, Iowa, and can be used at Station KMA-FM's present transmitter site. Channel 246C3 can be allotted to Maryville, Missouri, and can be used at Station KNIM-FM's present transmitter site. [3]

3. As requested, we also propose to modify Landen's construction permit to specify Channel 290C2, if allotted to Omaha, and Nodaway's license for Station KNIM-FM to specify Channel 246C3, if allotted to Maryville. In accordance with Section 1.420 of the Commission's Rules, we will not accept competing expressions of interest in use of either channel. Although the allotment of Channel 246C3 to Maryville represents a non-adjacent channel upgrade, we have confirmed that Channel 291C3 can also be allotted to Maryville for use by other interested parties. Channel 291C3 can be allotted to Maryville without the imposition of a site restriction.[4] If Channel 295A is substituted for Channel 293A at Plattsmouth, the applicants for the channel will be permitted to amend their applications without loss of cut-off protection. Finally, Landen states that she will reimburse the licensees of Stations KMA-FM at Clarinda, Iowa, KUTT at Fairbury, Nebraska, and KNIM-FM at Maryville, Missouri, for the reasonable and prudent expenses associated with their change of channel.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Clarinda, Iowa	257C2	291C2
Maryville, Missouri	257A	246C3
Fairbury, Nebraska	257C1	258C1
Omaha, Nebraska	222C, 231C, 241C, 260C, 264C, 283C, 290A	222C, 231C, 241C, 260C, 264C, 283C, 290C2
Plattsmouth, Nebraska	293A	295A

5. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, KMA Broadcasting, L.P. ("KMA"), licensee of Station KMA-FM, Channel 291C2, Clarinda, Iowa, and Siebert Communications, Inc. ("Siebert"), licensee of Station KUTT, Channel 257C1, Fairbury, Nebraska, SHALL

SHOW CAUSE why their licenses SHOULD NOT BE MODIFIED to specify operation on Channels 257C2 and 258C1, respectively, as proposed herein.

6. Pursuant to Section 1.87 of the Commission's Rules, KMA and Siebert may, not later than **February 23, 1990,** file a written statement showing with particularity why their licenses should not be modified as proposed in the *Order to Show Cause*. The Commission may call on KMA and/or Siebert to furnish additional information. If KMA and/or Siebert raise a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date refered to above, KMA and Siebert will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the abovementioned channel modifications are ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the following:

KMA Broadcasting,
L.P.
Station KMA-FM
209 N. Elm Street
Shenandoah, Iowa 51601

Siebert Communications,
Inc.
Station KUTT
414 Fourth
Fairbury, Nebraska 68352

Platte Broadcasting
Company, Inc.
625 First Avenue
Plattsmouth, Nebraska 68048
(ARN-880714NY)

Communications Ventures
Ltd. Partnership
12906 S. 30th Street
Bellevue, Nebraska 68123
(ARN-880714MF)

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **February 23, 1990,** and reply comments on or before **March 12, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Steve Mickelson, President
Nodaway Broadcasting Corp.
Box 278
Maryville, Missouri 64468
(Petitioner for Maryville)

Dennis P. Corbett, Esq.
Stephen D. Baruch, Esq.
Leventhal, Senter & Lerman
2000 K Street, N.W., Suite 600
Washington, D.C. 20006-1809
(Counsel to Landen)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in

reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Two applications have been filed for Channel 293A at Plattsmouth, one by Platte Broadcasting Co. (ARN-880714NY) and the other by Communications Ventures Ltd. (ARN-880714MF). We note that Channel 295A cannot be used at either of the sites proposed by the applicants. Therefore, we will serve a copy of this *Notice of Proposed Rule Making* on the applicants.

[2] KUTT, in its pending application for Channel 257C1 at Fairbury, specified coordinates of North Latitude 40-09-37 and West Longitude 97-16-12 (BPH-890721IF). These coordinates represent a move from its licensed site on Channel 257A. Channel 257C1 at KUTT's licensed site would be short-spaced to Class A Station KNIM at Maryville. Thus, the allotment of Channel 258C1 in lieu of Channel 257C1 at Fairbury, with the need to relocate its transmitter from its presently licensed site, does not constitute a forced relocation of an existing station's transmitter.

[3] The coordinates for Channel 290C2 at Omaha, Nebraska, are North Latitude 41-08-39 and West Longitude 95-46-38. The coordinates for Channel 258C1 at Fairbury, Nebraska, are 40-14-41 and 97-03-16. The coordinates for Channel 295A at Plattsmouth, Nebraska are 41-01-28 and 95-49-34. The coordinates for Channel 257C2 at Clarinda, Iowa, are 40-33-12 and 95-07-18. The coordinates for Channel 246C3 at Maryville, Missouri, are 40-19-41 and 94-52-31.

[4] The coordinates for this allotment are North Latitude 40-20-42 and West Longitude 94-52-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-593

In the Matter of

Amendment of Section 73.202(b), RM-7069
Table of Allotments,
FM Broadcast Stations.
(Piketon, Ohio)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 7, 1989; Released: January 2, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Ohio Kentucky Radio Company (petitioner), requesting the allotment of Channel 261A to Piketon, Ohio, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Channel 261A can be allotted to Piketon in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence is required since Piketon is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 261A to Piketon, Ohio, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Piketon, Ohio	--	261A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 23, 1990,** and reply comments on or before **March 12, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James P. Wagner
Ohio Kentucky Radio Company
P.O. Box 14083
Covington, Kentucky 41014
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 39-04-00 and West Longitude 83-00-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-592

In the Matter of

Amendment of Section 73.202(b), RM-7078
Table of Allotments,
FM Broadcast Stations.
(Cedar Falls, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 7, 1989; Released: January 2, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Denise Neubauer (petitioner) requesting the allotment of Channel 253C3 to Cedar Falls, Iowa, as the community's first local FM service. Petitioner states that she will apply for the channel, if allotted. Channel 253C3 can be allotted to Cedar Falls in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 253C3 to Cedar Falls, Iowa, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Cedar Falls, Iowa	--	253C3

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **February 23, 1990,** and reply comments on or before **March 12, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Denise Neubauer
1078 South Gale Road
Davison, Michigan 48423
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 42-31-30 and West Longitude 92-27-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-591

In the Matter of

Amendment of Section 73.202(b), RM-7079
Table of Allotments,
FM Broadcast Stations.
(Cottage Grove, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 7, 1989; Released: January 2, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Susan M. Ciborosky (petitioner) requesting the allotment of Channel 288C1 to Cottage Grove, Oregon, as the community's first local FM service. Petitioner states that she will apply for the channel, if allotted. Channel 288C1 can be allotted to Cottage Grove in compliance with the Commission's minimum distance separation requirements with a site restriction of 17.5 kilometers (10.9 miles) southwest to avoid a short-spacing to Station KWBX, Channel 289C2, Bend, Oregon, and Station KFAT, Channel 291C, Corvallis, Oregon.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 288C1 to Cottage Grove, Oregon, since an interest has been expressed in providing the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Cottage Grove, Oregon	--	288C1

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **February 23, 1990,** and reply comments on or before **March 12, 1990** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Susan M. Ciborosky
1608 Highland Avenue
Hubertus, Wisconsin 53033
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 43-42-04 and West Longitude 123-13-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-590

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Sumter and Columbia, South Carolina)	RM-7071

NOTICE OF PROPOSED RULE MAKING

Adopted: December 7, 1989; Released: January 2, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Gamecock City Broadcasting, Inc. (petitioner), requesting the reallotment of Channel 267C from Sumter to Columbia, South Carolina, and the modification of its license for Station WWDM accordingly.

2. Petitioner states that Columbia, with a population of 101,208 persons, is the capital of South Carolina, and third largest Standard Metropolitan Statistical Area ("SMSA") in the state, with a population of 410,088 persons.[1] It notes that Columbia has only three local FM services, one Class C1 and two Class C.[2] It contrasts this situation with that of Sumter, with a population of 24,890 persons, which currently has local commercial service from three fulltime AM stations and one FM station and will be served by a second FM station for which applications are pending. Petitioner also notes that Sumter has local noncommercial educational service from Station WRJA-FM. Petitioner contends that the public interest would be served by reallotting Channel 267C to Columbia since it could provide the much larger community with an additional competitive service. It goes on to state that Sumter will continue to have four local commercial radio services and be served by ten commercial radio services. It states that no change in transmitter site is required since Columbia and Sumter are already encompassed within Station WWDM's 3.16 mV/m contour. [3] [4]

3. Based on our review of the information before us, we tentatively conclude that the proposal, if granted, would result in a preferential arrangement of allotments. Columbia, with a population approximately four times greater than Sumter, has licensed to it only twice the local aural service now provided to Sumter. Therefore, we believe the public interest would be served by proposing to reallot Channel 267C from Sumter to Columbia, South Carolina, and modify the license of Station WWDM accordingly, since it could provide the larger community with an additional local service without depriving Sumter of its sole local broadcast service. As requested, we also propose to modify petitioner's license for Station WWDM to specify Columbia as its community of license. In accordance with Section 1.420(i), we will not accept competing expressions of interest in use of the channel at Columbia. *See, Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989).

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Columbia, South Carolina	228A, 248C1, 276A, 284C	228A, 248C1, 267C, 276A, 284C
Sumter, South Carolina	234A, 267C	234A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 23, 1990,** and reply comments on or before **March 12, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard F. Swift, Esq.
Tierney & Swift
1200 - 18th Street, N.W., Suite 210
Washington, D.C. 20036
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission

specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures are taken from the 1980 U.S. Census, unless otherwise indicated.

[2] Columbia actually obtains local service from four commercial FM stations, two Class A, one Class C1 and one Class C.

[3] The coordinates for this allotment are North Latitude 34-03-04 and West Longitude 80-40-55.

[4] Station WWDM is a grandfathered short-spaced station. The modification of its license to specify Columbia complies with the requirements of Section 73.213. Section 73.213 states that such grandfathered stations may be modified or relocated provided that the predicted distance to the 1 mV/m field strength contour is not extended toward the 1 mV/m contour of any short-spaced station. Since the petitioner is not proposing to move its transmitter site, there is no change in the existing short-spacing situation.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-594

In the Matter of

Amendment of Section 73.202(b), RM-7142
Table of Allotments,
FM Broadcast Stations.
(Harrisburg, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 7, 1989; Released: January 2, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by York David Anthony (petitioner) requesting the allotment of Channel 224A to Harrisburg, North Carolina, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted. Channel 224A can be allotted to Harrisburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.3 kilometers (2.7 miles) northwest to avoid a short-spacing to Station WKRR, Channel 222C, Asheboro, North Carolina, and Station WZNS, Channel 225C, Dillon, South Carolina.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 224A to Harrisburg, North Carolina, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Harrisburg, North Carolina	--	224A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **February 23, 1990,** and reply comments on or before **March 12, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

York David Anthony
2613 Craig Avenue
Concord, North Carolina 28025-4107
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 35-20-28 and West Longitude 80-41-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications Tariff F.C.C. No. 3 — Transmittal Nos. 19 and 20

ORDER

Adopted: December 6, 1989; Released: December 6, 1989

By the Chief, Common Carrier Bureau:

1. On September 8, 1989, US West Communications (US West) filed Transmittal No. 19 by which it proposes to provide Federal Government Telecommunications Service (FGTS) "to the agencies of the Federal Government, and any Interexchange Carrier (IXC) serving such agencies." US West Tr. No. 19, Letter of Transmittal at 1. In Transmittal No. 20, filed the same day, US West proposes to add FGTS Transition Coordination for AT&T and US Sprint, the two carriers selected by the General Services Administration (GSA) to provide FTS 2000 service to agencies of the Federal Government. MCI Telecommunications Corporation (MCI) has filed petitions to reject or suspend and investigate both transmittals and US West has filed replies.

2. MCI argues that the FGTS rates in Transmittal No. 19 are unduly preferential. Moreover, MCI asserts, even if the Federal Government may be extended preferential rates under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), which permits the creation of a "Government" services classification, that classification should not be read to include customers other than the Government (such as AT&T and US Sprint). MCI also contends that the FGTS rates should be available to all similarly situated customers. MCI Tr. No. 19 Petition at 2-4. Further, MCI argues, US West has not demonstrated that FGTS will recover all relevant costs and contends that US West's demand and revenue projections are based on unreasonable assumptions. *Id.* at 4-8. Finally, MCI argues that US West should reduce its nonrecurring charges for non-FGTS special access services to compensate for the revenues that will be produced by FGTS Transition Coordination service. MCI Tr. No. 20 Petition at 1-2.

3. In reply, US West argues that MCI's reading of Section 201(b) is too narrow. According to US West, the presence of a third party, namely, the interexchange carrier (IC), in the provision of service does not alter the nature of the service which is ultimately provided to the Government. US West Tr. No. 19 Reply at 3-8. Nor does US West agree that it must make FGTS available to customers other than the Federal Government and ICs serving the Government. *Id.* at 8-9. US West also states that FGTS will cover its fully-assigned unit costs and will not be subsidized by other services. *Id.* at 12. US West states that the assumptions underlying its net revenue test are reasonable. *Id.* at 13-19. Finally, US West concedes that it will be obliged to account for revenues from FGTS Transition Coordination service but states that it will not realize any revenues from this service until late 1990 and thus should not account for such revenues during the current ratemaking period. US West Tr. No. 20 Reply at 2-3.

4. The Common Carrier Bureau has reviewed the tariff revisions and the pleadings. We conclude that no compelling argument has been presented that the proposed tariff revisions are patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petitions to reject or to suspend and investigate US West Communications Tariff F.C.C. No. 3, Tr. Nos. 19 and 20, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 12, 1989

DEPRECIATION RATE PRESCRIPTIONS PROPOSED FOR THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY PLEADING CYCLE ESTABLISHED

Comments are invited on the Common Carrier Bureau staff's proposed depreciation rates and amortizations for the American Telephone and Telegraph Company (AT&T). The staff recommends that the amortizations previously prescribed by this Commission be continued. In addition, it recommends that the one year reserve imbalance amortization of $143.8 million for the Analog Circuit Account, granted on interim authority on June 8, 1989, be continued until December 31, 1989. The staff also recommends various life and salvage changes. If approved the proposal would increase AT&T's annual depreciation expense by $994 million.

On February 15, 1989, AT&T filed a petition seeking changes in the manner in which the Commission prescribes AT&T's depreciation rates. AT&T requested that the Commission permit AT&T to set its depreciation rates for regulatory reporting purposes based on the depreciation rates it uses for financial reporting purposes. To accomplish this, AT&T requested that the Commission, on an ongoing basis, allow AT&T to seek represcription whenever its financial reporting depreciation rates change, and apply depreciation rates to plant categories on a nationwide, rather than state-by-state, basis. AT&T also filed a schedule of revised depreciation rates reflecting these proposed changes.

By Memorandum Opinion and Order (FCC 89-325) adopted November 22, 1989, the Commission determined that there is no longer a federal regulatory need for the prescription of AT&T's depreciation rates on a state-by-state basis. The Commission also determined that AT&T should be allowed to file proposed revised depreciation rates every other year. The Commission declined to change its procedures to allow AT&T to file book depreciation rates that are based on the data and methodologies AT&T uses for financial reporting purposes. However, the Commission directed the staff to conduct a review of AT&T's revised depreciation rates using established depreciation rate procedures.

Prior to release of FCC Order No. 89-325, AT&T submitted a depreciation study using more traditional depreciation procedures and methods. The staff conducted a review of this study. On November 24, 1989, the staff sent letters to the state public utility commissions describing its preliminary recommendations and requesting their comments on the life, salvage and curve shape parameters to be used for the prescription of the proposed depreciation rates. In addition, the staff discussed AT&T's study, as well as the staff's preliminary recommendations, with representatives of several state commissions. The staff has considered all this additional information and recommends the life, salvage and curve shape parameters which underlie the rates used to calculate AT&T's annual depreciation expense change of $994 million. The proposed effective date for the represcription is January 1, 1989, the date that AT&T requested in its February 1989 filing.

Copies of AT&T's traditional study, the staff's November 24, 1989 review letter and other data supporting the proposed rates are available for public inspection in the Commission's Accounting and Audits Division, Suite 257, 2000 L Street N.W., Washington, DC. Copying facilities are available in Suite 812, 2000 L Street.

Parties wishing to file comments on the proposals as summarized herein may do so by December 27, 1989. Replies may be filed by January 8, 1990. A copy of the comments and replies should be provided to the Chief, Depreciation Rates Branch.

For additional information contact Ms. Fatina Franklin, Chief, Depreciation Rates Branch (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALASCOM, INC.

Revisions to Tariff F.C.C. No. 9,
Transmittal Nos. 560 and 568
ReadyLine 800 Promotional Offerings

ORDER

Adopted: December 15, 1989; Released: December 15, 1989

By the Chief, Common Carrier Bureau:

1. On October 2, 1989, Alascom, Inc. (Alascom) filed its Transmittal No. 560, proposing promotional offerings for its ReadyLine 800 service. Transmital 560 is scheduled to become effective on December 16, 1989, on 75 days' notice. General Communications, Inc. (GCI) filed a petition to reject or, alternatively, to suspend and investigate, on October 17 (GCI Petition); Alascom replied on October 27.

2. GCI asserts that Alascom is a dominant interexchange carrier (IC) within the meaning of the Commission's Competitive Common Carrier decisions.[1] GCI claims that Alascom provides MTS and WATS service pursuant to the Commission's "rate integration" policy, which requires Alascom's MTS and WATS rates to "mirror" AT&T's MTS and WATS rates for comparable services. *Id.* GCI argues that Alascom's Transmittal 560 should be rejected because it does not mirror AT&T's ReadyLine 800 rates. *Id.* at 5. Specifically, GCI claims AT&T makes promotional offerings only from July 19 to December 31, 1989, while Alascom's Transmittal makes promotional offerings indefinitely. *Id.* at 5. GCI also maintains that AT&T's promotion allows it to waive only non-recurring installation charges, while Alascom's promotion would waive monthly recurring costs for up to four months in addition to the non-recurring charges. *Id.* In addition, GCI contends that AT&T requires a minimum usage for customers ordering more than fifteen lines, while Alascom does not impose any minimum. *Id.*

3. At the time of Alascom's reply, Alascom amended its original tariff revisions so that its promotion now mirrors AT&T's ReadyLine 800 tariffs.[2] Alascom's amendments also require that Alascom seek special permission from the Commission on a case-by-case basis before making any promotional offerings. Alascom Transmittal 568, at page 4.1.2.

4. The Common Carrier Bureau has reviewed Transmittal No. 560, the Description and Justification supporting it, GCI's petition, and Alascom's reply and revisions. We conclude that no compelling argument has been raised that the tariff revisions as amended are patently unlawful so as to require rejection, and that an investigation is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or in the alternative to suspend and investigate Alascom, Inc., Tariff No. 9, Transmittal No. 560, filed by General Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] GCI Petition at 2 (citing Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Therefor, Fourth Report and Order, CC Docket No. 79-252, 56 Rad. Reg. 2d 1219 (1983)).

[2] Alascom Transmittal No. 568, filed Nov. 6, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies
Revisions to Tariff F.C.C. No. 2
Petition for Waiver

Transmittal No. 373

ORDER

Adopted: December 20, 1989; Released: December 20, 1989

By the Chief, Common Carrier Bureau:

1. The above-captioned tariff revisions were filed by Ameritech Operating Companies (Ameritech) on September 29, 1989, and are scheduled to take effect on December 20, 1989. These revisions establish aggregated regional rates for Ameritech's interstate access service. Ameritech also filed a petition for waiver of Sections 65.702(c) and 69.105(b) of the Commission's Rules, 47 CFR §§ 65.702(c) and 69.105(b). A petition to investigate the tariff and an opposition to the waiver were filed by Allnet Communications Corporation (Allnet). Ameritech replied.

2. Ameritech states that this filing revises its switched and special access rates to establish aggregated regional rates. Thus, in most cases, a single rate for each rate element will apply in the five states in the Ameritech region.[1] Ameritech proposes, however, a transition plan for terminating carrier common line (CCL) charges. Under this plan, Ameritech will move its existing terminating CCL rates to a uniform regional rate in three steps over an eighteen month period.[2] Ameritech also proposes no changes in its digital special access rates and individual case basis (ICB) rates. The carrier claims that digital rates will be developed based on a regional revenue requirement in the 1990 annual filing. Ameritech cites *Authorized Rates of Return*, FCC 86-114, rel. March 24, 1986, in support of this partial aggregation. [3]

3. During the proposed transition period, Ameritech's CCL rates are neither regional rates nor state specific rates. Thus, the carrier requests a waiver of Sections 69.105(b) and 65.702(c) to implement its transitional rates, and to report its earnings on a regional basis during the transition. Ameritech states that the Bureau previously granted similar waivers and cites *Mountain States Telephone and Telegraph Company, Tr. No. 194*, 4 FCC Rcd 797 (1989), and *Mountain States Telephone and Telegraph Company, Petition for Waiver*, 3 FCC Rcd 4805 (1988).[4]

4. Allnet argues that Ameritech did not take into account demand changes when modifying the rates. Allnet also opposes the waiver request because a flash cut to uniform rates would produce larger decreases sooner in CCL rates in Michigan and Indiana.[5] In addition, Allnet maintains that immediate movement to regional rates would merely undo the disruption that occurred when Ameritech withdrew from the National Exchange Carrier Association (NECA) CCL tariff and adopted state specific rates. Finally, Allnet claims that the transitional CCL rates complicate the 1990 access tariff review process.[6]

5. Ameritech replies that demand will not change because the rate increases and decreases are revenue neutral to the large interexchange carriers, and demand cutbacks will be normalized by demand increases for smaller interexchange carriers. Ameritech defends its transitional rates as minimizing disruption to its customers. Although Ameritech admits that a one-step change would have resulted in lower CCL rates in some states, it emphasizes that other states would experience significantly greater increases without a transition.[7] Ameritech disputes that any disruption occurred when it withdrew from the NECA tariff, stating that all its states experienced rate decreases at that time. Finally, Ameritech maintains that it has provided all data required in support of the 1990 access tariff filing, and that the Bureau did not require it to use any specific formula for determining its new rates.[8]

6. The Common Carrier Bureau has reviewed the tariff transmittal and the pleadings filed by Allnet and Ameritech. We find that no compelling argument has been presented that the tariff is patently unlawful so as to require rejection and that an investigation of the revisions is not warranted at this time.

7. Furthermore, we have reviewed Ameritech's petition for waiver of Sections 65.702(c) and 69.105(b) of the Commission's Rules and conclude that it should be granted. We recently granted US West's requests for waiver of Section 65.702(c) with respect to its proposals for region-wide aggregation of its switched and special access rates, and we find that such a waiver is appropriate here for similar reasons.[9] Allnet argues against the transition plan on the grounds that the total decrease in rates should be implemented immediately. Allnet's argument fails to consider, however, that the transition plan minimizes the burden on customers by also phasing-in rate increases. Therefore, we reject Allnet's argument.

8. IT IS THEREFORE ORDERED that the petition against Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 373, filed by Allnet Communications Corporation IS DENIED.

9. IT IS FURTHER ORDERED that the petition for waiver of Sections 65.702(c) and 69.105(b) of the Commission's Rules, 47 CFR §§ 65.702(c) and 69.105(b), filed by the Ameritech Operating Companies IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Ameritech Transmittal No. 373, Description and Justification (D&J) Section 1 at 1.

[2] Each step in the proposed transition will move each state's terminating CCL rate closer to a final regional target rate by a percentage amount. The resulting rate is then adjusted by a regional ratio derived by dividing the target uniform regional rate as of July 1, 1990 by the target uniform regional rate as of

April 1, 1990. The second and third steps will be taken in the 1990 and 1991 annual access filings, respectively. Ameritech Petition for Waiver at 1-2.

[3] D&J Section 1 at 4, 10.

[4] Ameritech Petition for Waiver at 1-3.

[5] Allnet Petition at 1.

[6] Allnet Supplemental Opposition to Petition for Waiver at 2-3.

[7] Ameritech Opposition and Reply at 2-3, 4.

[8] Ameritech Reply in Support of Petition for Waiver at 2, 3-4.

[9] *See Mountain States Telephone and Telegraph Company,* Tr. No. 194, 4 FCC Rcd 797 (1989), and *Mountain States Telephone and Telegraph Company, Petition for Waiver,* 3 FCC Rcd 4805 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company Tariff F.C.C. No. 68 — Transmittal No. 1858

ORDER

Adopted: December 22, 1989; Released: December 22, 1989

By the Chief, Common Carrier Bureau:

1. On September 18, 1989, Southwestern Bell Telephone Company (Southwestern Bell) filed Transmittal No. 1858 to extend its Network Reconfiguration Service to customers in Arkansas and to make changes in existing rates for the service. NRS is an optional service which can be ordered with Southwestern Bell's special access service. Southwestern Bell Description and Justification (D&J) at 1. The proposed service allows customers to control their special access facilities at the DS1 (1.544 Mbps) level on either a real-time or prearranged basis. *Id.* MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate the transmittal on October 10, 1989, alleging that NRS violates the Modification of Final Judgment (MFJ).[1] Southwestern Bell replied on October 16, 1989. Transmittal 1858 is scheduled to become effective on December 24, 1989.

2. MCI asserts that NRS allows customers to reconfigure their interstate special access networks without consulting interexchange carriers (ICs) and without concern for the possible impact high capacity circuit reconfigurations may have on an IC's network. MCI Petition at 2. MCI also claims that NRS is an interexchange and information service, both of which the Bell Operating Companies are prohibited from providing by the MFJ. *Id.* at 2-3. MCI does not challenge any of the changes proposed by Southwestern Bell for its existing NRS rates.

3. Southwestern Bell replies that MCI mischaracterizes NRS in claiming that it allows customers to disregard ICs and their networks. Southwestern Bell Reply at 2-3. NRS only allows, Southwestern Bell continues, for the reconfiguration of intraLATA circuits and, thus, does not affect IC service. *Id.* Southwestern Bell also denies that NRS is an information service, explaining that the service merely allows Southwestern Bell customers to contact its Operational Support System in order to reconfigure their networks.[2] *Id.* at 3-4. Moreover, Southwestern Bell argues, NRS is incidental to its provision of access service and is, therefore, allowable under the MFJ. *Id.* Finally, Southwestern Bell asserts that the Commission does not have jurisdiction to decide any disputes arising under the MFJ; rather, that jurisdiction resides with the Department of Justice or the MFJ Court. *Id.* at 3.

4. The Common Carrier Bureau has reviewed the tariff transmittal, Southwestern Bell's revisions, and the various pleadings. We conclude that no compelling argument has been presented that the tariff revision warrants investigation.

5. Accordingly, IT IS ORDERED that the petition to suspend and investigate filed by MCI telecommunications Corporation against Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal No. 1858 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982).

[2] Southwestern Bell has centralized its Operational Support Systems in two locations -- Dallas, Texas, and St. Louis, Missouri. Southwestern Bell Reply at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-305

In the Matter of

General Telephone Operating Companies Revisions to Tariff F.C.C. No. 1 — Transmittal No. 540

ORDER

Adopted: November 14, 1989; Released: November 15, 1989

By the Deputy Chief, Common Carrier Bureau:

1. On September 26, 1989, GTE Telephone Operating Companies (GTOC) filed Transmittal No. 540, which would offer general tariffed rates for DS3 high capacity (HiCap) services in the states of Michigan, Nebraska, and Ohio, and would revise DS3 rates in the states of Illinois and Wisconsin. The DS3 service currently offered by GTOC in those states is provided on an individual case basis (ICB). On October 11, 1989, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal 540 (MCI Petition), to which GTOC replied on October 23, 1989 (GTOC Reply). GTOC Transmittal 540 is currently scheduled to become effective on November 16, 1989.

2. GTOC's proposed DS3 offering under Transmittal 540 contains a rate structure identical to the filings it has made for DS3 service in other states, which are currently under investigation in CC Docket 89-305.[1] That rate structure includes one element for DS3 Special Access Lines (SALs) which either terminate at an interexchange carrier's (IC's) point of presence (POP) or, in the case of End User SALs, at all other locations. The second DS3 rate element is Special Transport, which consists of charges for each termination of a special transport facility and an additional charge assessed based on the airline mileage between terminating locations. In addition, rates for DS3 service vary depending upon whether the customer selects GTOC's one, three, five, or seven year DS3 HiCap service commitment option.

3. MCI argues that GTOC's rates are not cost-based and that GTOC must justify its rates under the Commission's *Strategic Pricing Order*.[2] MCI maintains that the crossover between GTOC's DS1 and DS3 services exceeds the 8 to 1 crossover ratio established by the Commission in the *Strategic Pricing Order*, and states that, based on its own calculations, the crossover between DS3 and DS1 should be even lower than the voice grade to DS1 crossover. MCI Petition at 2. MCI contends that the rates for DS3 service where DS3 facilities exist make it more costly to convert to DS3 than to maintain existing DS1 circuits. *Id.* at 3. MCI further contends that in the state of Michigan conversion to DS3 service is only cost effective for those ICs which generate enough traffic for at least four DS3 channels, and that at this time there is only one IC large enough consistently to take advantage of this economy of scale. Therefore, MCI asserts, GTOC's transmittal discriminates among ICs. *Id.* at 4. In addition, MCI maintains that the DS3 rates for the states of Michigan and Nebraska discourage conversion from DS1 to DS3, and that rate structures in all GTOC areas discourage the construction of new DS3 facilities.

4. In reply, GTOC asserts that its rates are properly cost-based and that this is demonstrated by the cost support material it submitted. GTOC Reply at 1. In addition, GTOC asserts that the *Strategic Pricing Order* does not apply to DS3 rates, and that the many differences between DS1 and DS3 services, such as their rate structures, make crossover comparisons meaningless. *Id.* at 3-4.

5. On June 28, 1989, this Bureau released an Order initiating Docket 89-305, an investigation of various GTOC general DS3 offerings. [3] Issues raised in that investigation generally include whether certain DS3 rates and rate structures are unreasonably discriminatory or provide an undue preference in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).[4] GTOC Transmittal 540 raises the same issues as the transmittals under investigation in Docket 89-305. Therefore, we have determined that Transmittal 540 should be subject to the outcome of that investigation. We also conclude that Transmittal 540 should be subject to an accounting order. To enable us to impose an accounting order, we are suspending Transmittal 540 for one day. In addition, we grant GTOC special permission to advance the effective date of Transmittal 540.

6. Accordingly, IT IS ORDERED that GTE Operating Companies, Tariff F.C.C. No. 1, Transmittal No. 540 IS INCORPORATED into the Commission's on-going investigation in CC Docket No. 89-305.

7. IT IS FURTHER ORDERED that the petition to suspend and investigate GTE Telephone Operating Companies Tariff F.C.C. No. 1, Transmittal No. 540, filed by MCI Telecommunications Corporation is GRANTED IN PART and otherwise IS DENIED.

8. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions are suspended for one day.

9. IT IS FURTHER ORDERED that GTE Telephone Operating Companies shall file a supplement reflecting the suspension of its DS3 rates for one day no later than November 20, 1989. For this purpose Special Permission No. 89-881 is assigned.

10. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, GTE Telephone Operating Companies shall keep accurate account of all amounts received pursuant to rates which are the subject of the investigation established in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

FOOTNOTES

[1] *See* GTE Telephone Operating Companies, Revisions to Tariff F.C.C. No. 1, CC Docket No. 89-305, 4 FCC Rcd 5425 (Com.Car.Bur. 1989) (*GTOC Designation Order*).

[2] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order*), *recon. pending.*

[3] *See GTOC Designation Order, supra,* 4 FCC Rcd 5425 (Com.Car.Bur. 1989).

[4] The Bureau also has under investigation in Docket 88-136 a number of local exchange carriers' (LECs) proposed DS3 ICB rates as well as issues concerning the continued use of ICB rates for DS3 offerings. That investigation has been expanded to include the Bell Operating Companies (BOCs') purportedly general DS3 tariffs which were subsequently filed. *See* Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues For Investigation, 3 FCC Rcd 2582 (Com.Car.Bur. 1988); and Second Supplemental Order Designating Isssues For Investigation, CC Docket No. 88-136, 4 FCC Rcd 4470 (Com.Car.Bur. 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-607

In re Applications of

STONE BROADCASTING CORPORATION (hereafter "Stone") File No. BPH-880113MC

ROBERTS BROADCASTING CORPORATION (hereafter "Roberts") File No. BPH-880114MX

For Construction Permit
for a New FM Station on Channel 256A,
in Emporia, Virginia

HEARING DESIGNATION ORDER

Adopted: December 12, 1989; Released: January 3, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Roberts*. As originally filed on January 14, 1988, Roberts' application contained a "NO" check to the financial qualifications question, indicating that sufficient net liquid assets were not on hand and that sufficient funds were not available from committed sources to construct and operate the requested facilities for three months. Roberts indicated that financial assurances have been obtained but not yet memorialized in writing, pending review of the submitted information. Roberts stated that certification would be subsequently supplied as an amendment to the application. On September 12, 1988, Roberts petitioned for leave to amend the application. The accompanying amendment contained a certification that Roberts was now financially qualified. The petition further stated that the amendment was submitted "during the amendment as of right period; good cause for acceptance of the amendment inheres in the fact that it was timely submitted and serves to establish the applicant's financial qualifications". On October 6, 1988 Stone filed an opposition to the petition for leave to amend.

3. Section 73.3522(a)(6) of the Commission's Rules provides that for a period of 30 days following the Commission's issuance of a Public Notice announcing the acceptance of the application for tender, minor amendments may be filed as a matter of right . . . Subsequent amendments prior to designation for hearing or grant will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514. In the instant case the notice of tender was issued on February 24, 1988; the 30 day amendment as of right filing period ended on March 28, 1988.

4. Accordingly, Roberts' attempt to cure the grantability defect is untimely. Furthermore, Roberts has failed to demonstrate good cause for the acceptance of the late-filed amendment. Consequently, the petition for leave to amend will be denied and the amendment returned. In addition, a financial qualifications issue will be specified below.

5. *Other Matters*. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENT FILED
Stone	May 16, 1989
Roberts	September 12, 1988

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

1. To determine, with respect to Roberts, whether the applicant is financially qualified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraphs 2-4 hereinabove, the amendment of September 12, 1988 filed by Roberts IS HEREBY RETURNED.

9. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Stone and Roberts ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by

attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Alpha Lyracom, d/b/a PAN AMERICAN SATELLITE — File Nos. CSS-84-004-(M) CSS-84-004-(M-1)

For Modification of Authorization to Operate an International Fixed-Satellite System for Communication Between Specified Geographical Areas.

Alpha Lyracom, d/b/a PAN AMERICAN SATELLITE — File No. CSS-84-004-P(LA)

Final Authority to Operate an International Fixed-Satellite System for Communication Between Specified Geographical Areas.

ERRATUM

Released: January 3, 1990

By the Chief, International Facilities Division:

1. Paragraphs 11 and 14 of the Memorandum Opinion, Order and Authorization in the above-captioned matter, DA 89-1604, released December 18, 1989, are hereby amended to read as follows:

> 11. IT IS FURTHER ORDERED that this authorization only applies to the provision of communications capacity between the United States and the countries specified in paragraphs 6 and 9 above. Any communication between the United States and other locations, as well as the provision of capacity for domestic communications within Latin American Countries, will require additional consultation under Article XIV of the INTELSAT Agreement; and
>
> 14. IT IS FURTHER ORDERED that prior to use of any other transponders on the satellite, or use of the satellite for communications to or from any points other than those specified in paragraphs 6 and 9, PAS shall obtain further authority from this Commission; and prior to use of the satellite for communications to or from any INTELSAT country other than those listed above, PAS shall receive verification from that country that it has fulfilled its obligation under Article XIV(c) or (d) of the INTELSAT Agreement and PAS shall forward such verification to this Commission.

All other terms and conditions of said Memorandum Opinion, Order and Authorization remain the same.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS, INC.
Revisions to Tariff F.C.C. Nos. 9 and 11

Transmittal No. 723

ORDER

Adopted: December 21, 1989; Released: January 3, 1990

By the Chief, Common Carrier Bureau:

1. The Bureau released an Order on November 7, 1986,[1] denying petitions to reject, investigate, or suspend the above-captioned tariff revisions, which altered cancellation charges applied by AT&T Communications, Inc. (AT&T) when customers cancel orders for private line service prior to the initiation of service.

2. That Bureau Order noted that AT&T had based the cancellation charges upon nonrecurring costs that might eventually be found excessive in the then pending private line investigation, CC Docket No. 85-400. The Bureau accordingly imposed an accounting order with respect to these charges. The Commission ultimately found that the nonrecurring costs under investigation in that docket were not excessive.[2] The purpose of this accounting order has become moot.

3. Accordingly, IT IS ORDERED that the accounting order imposed on AT&T Communications, Inc., with respect to Transmittal No. 723 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T Communications, Inc., Transmittal No. 723, Memorandum Opinion and Order, 1 FCC Rcd 992 (Com.Car.Bur. 1986).

[2] Investigation of AT&T Communications, CC Docket No. 85-400, 3 FCC Rcd 4579, 4582 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-119

In re Applications of

BREEZE BROADCASTING COMPANY, LTD.	File No. BPH-840503IC
MARANATHA BROADCASTING COMPANY, INC.	File No. BPH-850712ME
J. MCCARTHY AND JUNE J. MILLER	File No. BPH-850712NT
GULF BREEZE BROADCASTING CO.	File No. BPH-850712OE

For Construction Permit for a New FM Station in Gulf Breeze, Florida

Appearances

Barry D. Wood and Ronald D. Maines on behalf of Breeze Broadcasting Company, Ltd; J. Geoffrey Bentley on behalf of Maranatha Broadcasting Company, Inc.; Donald J. Evans and Pamela Cooper on behalf of J. McCarthy and June J. Miller; A. Wray Fitch, III and James A. Gammon on behalf of Gulf Breeze Broadcasting, Co.; and Norman Goldstein on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: December 20, 1989; Released: January 3, 1990

1. This is a multi-applicant proceeding for authority to construct a new FM radio station in Gulf Breeze, Florida. The present list of applicants is as follows: Breeze Broadcasting Company, Ltd. (Breeze); Maranatha Broadcasting Company, Inc. (Maranatha); J. McCarthy and June J. Miller (the Millers); and Gulf Breeze Broadcasting Co. (Gulf Breeze).[1] The applications were designated for hearing on the following issues:

a. To determine whether the following applicants have proposed locations of their main studios in accordance with 47 C.F.R. 73.1125: Maranatha and Gulf Breeze Wireless Company (Wireless);[2]

b. To determine whether there is a reasonable possibility that tower height and location proposed by the following applications would constitute a hazard to air navigation: Delta Broadcasting Corporation (Delta) [3] and Gulf Breeze FM Group Limited Partnership (GBFM);

c. To determine which of the proposals would on a comparative basis, best serve the public interest; and

d. To determine in light of the evidence addressed and pursuant to the foregoing issues which of the applications should be granted, if any.

2. With respect to the main studio issue set forth in one (1) above, Maranatha amended its application to make it clear that it intended to locate its main studio within the city limits of Gulf Breeze, Florida, and the issue is, therefore, resolved in Maranatha's favor. *See* Petition for Leave to Amend filed as a matter of right on June 1, 1987. The Wireless application was dismissed with prejudice, thereby eliminating the need to resolve that issue with respect to Wireless. *See, Order* FCC 88M-257, released February 3, 1988. Similarly, the Delta and GBFM applications were dismissed with prejudice, making further inquiry under the designated air hazard issue unnecessary. *See Orders* FCC 87M-2579 and FCC 87M-1611 released in this proceeding on October 16, 1987 and July 10, 1987, respectively. The sole issue awaiting resolution here is the so-called standard comparative issue.

3. Hearing sessions were held at the Commission from March 8 through March 17, 1988, after which the record was closed.

Preliminary Matter

4. The Millers filed a Petition for Leave to Amend on January 9, 1989, to report the death of Mrs. Miller on December 10, 1988, and that by operation of law, Mr. Miller was now owner of 100 percent of the equity of the applicant. Mr. Miller proposes to assume Mrs. Miller's 50 percent equity portion as well as her quantitative integration credit, and he posits that he is entitled to receive a 100 percent full-time quantitative integration credit for his proposal to work a minimum of 40 hours a week as the station's General Manager.

5. The amendment will be accepted for reporting purposes only. The Miller application will, however, be evaluated not as amended to reflect Mr. Miller's 100 percent ownership interest but as it stood as of the so-called B cut-off date. Whether or not the Millers are entitled to the claimed 100 percent quantitative integration credit will depend on whether or not Mrs. Miller's proposal is found to warrant a full-time integration credit.

BREEZE BROADCASTING COMPANY, LTD.

Findings of Fact

6. Breeze is a Florida limited partnership composed of two general partners, William H. and Patsy T. Phillips and two limited partners, Houston L. and Voncile R. Pearce. Each of the four principals holds 25 percent of the equity in the partnership (Breeze Exhibit #1, p. 1).

Best Practicable Service

William H. Phillips

7. William H. Phillips will work full-time at the proposed station, or a minimum of forty (40) hours a week, as General Manager (Breeze Exhibit #2, p. 1; Tr. 130). Mr. Phillips will direct and oversee the day-to-day operations and management of the station, and he will have ultimate authority and responsibility for sales, the sales staff, the station's finances, as well as the technical operations of the station (Breeze Exhibit # 2, p. 1).

8. Mr. Phillips has been a resident of Spanish Fort, Alabama since 1975. Spanish Fort is located approximately 45 miles from Gulf Breeze, Florida (Breeze Exhibit # 2, p. 1). He proposes to move to the town of Gulf Breeze in the event that Breeze is the successful applicant (Breeze Exhibit # 2, p. 1). From 1981 to 1984, Mr. Phillips was a member of the Board of Directors of the Gulf Coast Chapter of the Epilepsy Foundation which includes within its sphere of activity the town of Gulf Breeze, Florida (Breeze Exhibit # 2, p. 4; Tr. 54).

9. Mr. Phillips' began his career in broadcasting in 1962 as a staff announcer at WPRN, Butler, Alabama. He subsequently worked for station WBIS, Centerville, Alabama and in 1966, he returned to WPRN as General Manager (Breeze Exhibit # 2, p. 3; Tr. 63-64). Between 1972 and 1984, he served as General Manager and Sales Manager at station WJQY, Chickasaw, Alabama (Breeze Exhibit # 2, p. 2; Tr. 65, 69-71).

Patsy T. Phillips

10. Mrs. Phillips proposes to devote a minimum of 40 hours a week to her duties as Station Manager and Program Director of the new Gulf Breeze station (Breeze Exhibit # 3, p. 1; Tr. 158-159). According to her testimony, she will have complete authority and discretion over the programming of the station, including news and public affairs, music selection and the station's programming format. Mrs. Phillips will also be responsible for the entire administrative operation of the station, and she will supervise and oversee all full-time and part-time employees except for the sales staff (Breeze Exhibit # 3, p. 1; Tr. 158-160).

11. Mrs. Phillips has lived within the Mobile-Pensacola service area, which includes Gulf Breeze, most of her life. In the event that Breeze's application is granted, Mrs. Phillips has indicated that she will move to Gulf Breeze, Florida (Breeze Exhibit # 3, p. 1).

12. From October 1981 to December 1983, Patsy Phillips worked full-time at station WJQY (FM) Chickasaw, Alabama, as Program Director and Bookkeeper (Breeze Exhibit # 3, p. 2).

Diversification

13. Except for its application for the Gulf Breeze facility, Breeze has no other applications for broadcast stations pending before this Commission or any interest in any medium of mass communications (Breeze Exhibit # 1, p. 2).

14. William Phillips is President and 50 percent owner of Faulkner-Phillips Media, Inc., the licensee of WBCA and WLPR (FM) at Bay Minette, Alabama. Mr. Phillips has committed himself to divest this interest and sever all connections with these stations in the event that Breeze is the successful applicant (Breeze Exhibit # 2, p. 2; Tr. 77-78).

15. Patsy Phillips has no interest of any kind in Fulkner-Phillips Media, Inc. or in any other medium of mass communications (Tr. 167).

16. Houston L. Pearce, a limited partner, is President, Director and a 50 percent stockholder of Radio South, Inc. (Breeze Exhibit # 1, p. 2). His wife, Voncile R. Pearce, also a limited partner in Breeze, is Vice President and also a Director of Radio South, Inc., the licensee of stations WARF, Jasper, Alabama and of WTSK and WTUG (FM) at Tuscaloosa, Alabama (Breeze Exhibit # 1, p. 2). Mr. Pearce is also Chairman of the Board of Directors in addition to holding 50 percent of the stock of Broadcasters and Publishers Inc. (Breeze Exhibit # 1; p. 2), the licensee of station WJDQ, Marion, Mississippi and WJDQ-FM, Meridian, Mississippi (Breeze Exhibit # 1, p. 2). He is also Chairman of the Board of Directors and a 40 percent stockholder of WGUD/Stereo, Inc. the licensee of WGUD at Moss Point, Mississippi and WGUD- FM at Pascagoula, Mississippi (Breeze Exhibit # 1, pp. 2-3). All of these stations are within 325 miles of Gulf Breeze but no closer than 200 miles (Tr. 107-109).

Conclusions of Law

17. The original Breeze partnership agreement was formed for the purpose of prosecuting an application for a new FM station in Mary Estes, Florida. The agreement pertinent to this proceeding is a revision of that original agreement.

18. Article III, Section I of the partnership agreement as filed with the State of Florida on May 10, 1984, mandates that "[t]he General Partners shall manage the partnership's business," and Section 3 of that Article provides that "[t]he Limited Partners shall not participate in the management or control of the partnership business, nor shall they transact any business for the partnership, or have the power to act for or bind the partnership, such powers being vested solely and exclusively in the General Partners." The Section goes on to state as follows: "the limited partner(s) shall not, affirmatively on negatively, act to exert "control" in any manner whatsoever, as the term "control" is defined or interpreted in the Communications Act of 1934, as amended. 47 U.S.C. Section 151 *et seq.*, the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. § 0.1 *et seq.;* and decisions of the Federal Communications Commission and courts of competent jurisdiction interpreting the provisions of the Communications Act of 1934 and the Rules and Regulations of the Federal Communications Commission" (Miller Exhibit # 6, 4).[4]

19. Article III, Section 2 of Breeze's limited partnership agreement confers upon the limited partners the right to consent to the salary paid the general partners if greater than that received at their last place of full-time employment, and the right under certain circumstances to convert the partnership to a corporation, see Article VI, Section 4, of the agreement, and to consent to the assignment of any partnership interest as well as the sale of all partnership assets. *See* Article VI and Article VII, (Miller Exhibit 6).

20. Breeze submits that it has always been its intention that the general partners would be in control of the enterprise and that the limited partners would be in-

sulated from both the management and control of the applicant. The partnership's agreement, as amended, supports this contention. Indeed, it states unequivocally that the limited partners shall not exert any control as that term is defined or interpreted by the Commission and courts of competent jurisdiction. Although opposing parties reference various sections of that agreement which, they contend, prove otherwise, the Presiding Judge is convinced that the agreement, even as it stood on the so-called B cut-off date provided the Commission with the necessary assurance that Breeze's limited partners would not be involved in the management and control of the entity and were, in fact, purely passive investors. This conclusion is supported by the testimony of Breeze's partners at the hearing, which clearly indicates that it has always been their intention that the limited partners not be involved in the prosecution of the application or in the management of the station.

21. The Pearces testified that they wanted nothing to do with managing the station and that they do not have the time to be involved in the operation of the station (Tr. 181, 190, 204). They currently live 300 miles from Gulf Breeze (Tr. 114) and they are involved in other businesses and broadcast ventures. In addition, Mrs. Pearce is a teacher at Walker Junior College in Northern Alabama (Tr. 181). The limited partners stated lack of interest in being actively involved in the prosecution of the Breeze application is further supported by the fact that the record lacks any evidence that they have had any input on the normal everyday decisions relating to the prosecution of the application. Furthermore, there is nothing in the record to indicate that they will be involved in the actual business of the partnership, including the day-to-day operations of the Gulf Breeze station. The recent amendments to the partnership agreement underscore this intent and effectively bar them from doing so.

22. In this regard, the Presiding Judge does not consider the Pearces' participation in settlement negotiations to contradict in any way this conclusion. The settlement negotiations which contemplated a merger would clearly have impacted on the interests of the limited partners (Tr. 118, 143-144). The limited partners, the Pearces, were contacted regarding this matter only after Mr. Phillips believed that he had a settlement in hand (Tr. 118). Apart from this one instance, the evidence of record indicates that the Pearces and the Phillips have had very limited contact since the filing of this application. According to Mr. and Mrs. Phillips, they have spoken to the Pearces less than 10 times since 1985, and Mr. Phillips saw Mr. Pearce in person for only the second time since 1985 on the occasion of their visit to Washington, D.C. for the Gulf Breeze hearing (Tr. 114-115). The mere fact that the Phillips and the Pearces have been in business together in the past does not, in the Presiding Judge's opinion, draw into question their stated intention that the Pearces will be merely passive investors in this enterprise.

23. The rights provided the limited partners, namely to consent to any increase in salary for the general partners, to the addition of any person to the partnership, to the assignment of any partnership interest, and to the sale of all of the partnerships' assets as well as the limited partners' right, under certain circumstances to require the conversion of the partnership into a corporation (Miller Exhibit 6), do not demonstrate that the limited partners will be materially involved in the operation or management of the partnership's business. The provisions set forth above are designed to ensure that the original equity interests remain the same except by mutual agreement of all of the partners.

24. Mr. Phillips testified that only he and Mrs. Phillips have the right to make capital calls (Tr. 93). A Memorandum of Agreement signed by the parties on March 1, 1984, indicates that financial contributions will be made in equal increments by each of the partners upon the call of the general partners (Breeze Exhibit 9). All parties to the agreement must agree on the amount of such additional contributions, Article II, Section 4 (Miller Exhibit 6). It appears reasonable to give the limited partners veto power with respect to the amount of such a call as well as to the addition of partners or assignment of any interest in the partnership, when they have entrusted their investment and tendered management rights to the general partners. The limited partners' right to convert the partnership to a corporation, if the business of the partnership is unprofitable on a cash flow basis for any three consecutive calendar quarters after the first two years after the initiation of broadcasting by any station(s) does not lead to the conclusion that the limited partners will be in a position to convert their limited partnership interests to that of voting shareholders in the new corporation. The agreement itself does not provide for the issuance of voting stock to the limited partners, if such an event should occur. It must be assumed, therefore, that the limited partners would under such a circumstance become non-voting shareholders, since such a status is consistent with the intentions of all of the parties when they created the initial business entity.

25. The Presiding Judge concludes, therefore, that the Breeze partnership agreement places both management and control of the enterprise in the hands of the general partners and specifically excludes the limited partners from any role in the management and control of the station. Accordingly, the Presiding Judge finds that the Pearces, Breeze's limited partners, are properly insulated for purposes of awarding integration credit, and Breeze is entitled to a 100 percent quantitative integration credit for its proposal to integrate on a full-time basis its general partners into management positions at the station. The 100 percent quantitative integration credit is qualitatively enhanced by the decision of the Phillips to move to Gulf Breeze, Florida in the event that Breeze is the successful applicant, by Mr. Phillips very limited participation in the civic affairs of the Gulf Breeze area, Mrs. Phillips' gender, and the Phillips' past broadcast experience.

Diversification

26. The Phillips have made a timely commitment to divest themselves of any and all media interests. The interests held by Breeze's limited partners are not chargeable to Breeze in view of the finding reached above that the Pearces are insulated from any management and/or control over the enterprise.

MARANATHA BROADCASTING, INC.

Findings of Fact

27. Maranatha is a Pennsylvania corporation with the following officers and directors: Richard C. Dean, President, David G. Hinson, Secretary-Treasurer and Barry N. Fisher and Joanna M. Dean, who along with the Messrs. Dean and Hinson are Directors of the corporation (Mara-

natha Exhibit # 1, p. 1). Maranatha is authorized to issue 750 shares of common voting stock, of which 60 are issued and outstanding. Mr. Dean holds 57 percent of the stock and Mr. Hinson and Mr. Fisher, 5 percent each (Maranatha Exhibit # 1, p. 1). The remainder of Maranatha's stock is officially in Richard C. Dean's name but it is intended that the stock be given to his four children (Tr. 300).

Best Practicable Service

28. Maranatha does not propose any integration of ownership into management.

Diversification

29. Maranatha is the licensee of stations WFMZ (FM) and WFMZ-TV in Allentown, Pennsylvania (Maranatha Exhibit # 3, p. 1). It is also the permittee for a new FM station at Grand Junction, Colorado and the permittee of WELQ (FM), Hertford, North Carolina (Maranatha Exhibit # 3, p. 1, Tr. 310-311). An affiliated company MBC Communications Southwest, Inc. is the licensee of KKJY-FM, Albuquerque, New Mexico (Maranatha Exhibit # 3, p. 1).

30. Richard Dean is an Officer and Director of United Educational Broadcasting, Inc., the permittee of non-commercial educational station WBMR-FM, Telford, Pennsylvania (Maranatha Exhibit # 3, p. 2). He is also President and sole shareholder of Lehigh Valley Mobile Telephone Company, the tentative selectee for the construction permit for a new multi-channel multipoint distribution service station at Atlantic City, New Jersey.

31. Neither Maranatha nor its shareholders have proposed to divest themselves of any interests in the aforementioned media of mass communications in the event that Maranatha's application for the Gulf Breeze facility is granted.

Conclusions of Law

Best Practicable Service

32. Maranatha has made no commitment to any integration of ownership into management for the proposed Gulf Breeze, Florida station. Accordingly, it is entitled to no integration credit.

Diversification

33. Maranatha owns five media interests in the United States, namely WFMZ (FM) in Allentown, Pennsylvania, KKJY (FM) in Albuquerque, New Mexico and one television station WFMZ-TV, Allentown, Pennsylvania. In addition, it holds construction permits for an unbuilt FM station in Hertford, North Carolina and Grand Junction, Colorado. These media interests are located at distances from Gulf Breeze, Florida of 910 to 1600 miles.

34. Neither Maranatha nor its shareholders have proposed to divest themselves of any interests in the aforementioned media of mass communications. These interests warrant the imposition of a diversification demerit against the Maranatha application. As noted above, however, the various media interests are located at a substantial distance from Gulf Breeze. Accordingly, they do not merit more than a moderate diversification demerit.

J. MCCARTHY AND JUNE J. MILLER

Findings of Fact

35. When the application was filed, the applicant was a general partnership with each individual Miller holding a 50 percent general partnership interest in the entity (Tr. 331-332). It was an oral partnership without any notes, papers or agreements memorializing the general partnership (Tr. 335, 380). On October 22, 1985, the Millers filed an amendment to their application advising the Commission that the applicant had been transformed into a tenancy by the entireties (Tr. 333). According to the Millers, the change in the nature of the applicant was made for estate planning purposes and that both of them owned 100 percent of the entity (Tr. 334, 341) and that it has always been their intention to share equally in the profits and losses of the station and to have equal rights in the management and conduct of the station's operations (Miller Exhibit # 1, p. 1). Exhibit # 1 of the Millers' direct case indicates that they, the Millers, each own a 50 percent interest as tenants by the entireties.

Best Practicable Service

J. McCarthy Miller

36. Mr. Miller proposes to serve full-time, not less than 40 hours a week, as the station's General Manager, Sales Director, and Editor (Miller Exhibit # 2, p. 4). He will oversee all aspects of the station's operations, including sales, programming, personnel, engineering, and administration (Miller Exhibit # 2, p. 4). All hiring and firing responsibilities will rest with Mr. Miller and all department heads will report directly to him (Miller Exhibit # 2, p. 4). As General Manager, Mr. Miller will also monitor the station's compliance with all FCC regulations and requirements (Miller Exhibit # 2, p. 4).

37. J. McCarthy Miller has been a resident of the Gulf Breeze service area for 18 years and plans to continue to reside there (Miller Exhibit # 2, 6). Mr. Miller has been a member of the Rotary Club of Pensacola since 1962 (Miller Exhibit # 2, p. 5). He also presently serves as a Board Member of the State Board Arthritis Foundation. Mr. Miller has been past President and Board Member of the following organizations: Pensacola Symphony Orchestra Society; Pensacola Little Theater; and the Pensacola Art Association. Mr. Miller is also a member of St. Johns Episcopal Church in Pensacola, Florida (Miller Exhibit # 2, p. 6). Since 1960, Mr. Miller and/or his companies have been members of the Junior Chamber of Commerce and the Chamber of Commerce of Pensacola, Florida. Mr. Miller is also a former Director of the National Marine Corps Reserve Officer Association; the Navy League of the United States; the Gulf Coast Council Boy Scouts; Junior Achievers; the Pensacola Junior College Foundation; the Fiesta of Five Flags; and the Florida Judicial Council (Miller Exhibit # 2, pp. 5-6). He has also participated in the YMCA, United Fund, Pensacola Catholic High School Foundation and the Baptist Hospital Building Fund drives. All of these organizations, as well as Mr. Miller's aforementioned directorships, are within the 1 mV/m contour of the Miller's proposed station (Miller Exhibit # 2, p. 6).

38. J. McCarthy Miller has been involved in broadcasting since 1947 when he became the Commercial Manager for station WEBJ at Brewton, Alabama (Miller Exhibit # 2, p. 1). From 1951 to 1955, he was a Commercial

Manager of radio station WSPB at Sarasota, Florida (Miller Exhibit # 2, p. 1), and from 1955 to 1959 he was Sales Manager and News Director at station WDCL in Tarpon Springs, Florida. Mr. Miller then served as President and General Manager of station WCOA licensed to Pensacola, Florida while serving as Vice President of WKIS (AM and FM), Orlando, Florida (Miller # 2, p. 3), and as Vice President of radio station WIBB at Macon, Georgia (Miller Exhibit # 2, p. 3). Mr. Miller also served as President of WBIA at Augusta, Georgia and WTRL at Bradenton, Florida during the late 1970's (Miller Exhibit # 2, p. 3; Tr. 408-409).

June J. Miller

39. Mrs. Miller proposed to serve full-time, a minimum of 40 hours a week, as the station's Business Manager and Music Director (Miller Exhibit # 3, 1).[5] In these capacities, Mrs. Miller would have overseen, directly, the administration of the overall business of the station, including the clerical and bookkeeping staffs, accounts receivable and payable, commercial continuity, station promotions, and public relations. Mrs. Miller also proposed to handle women's and social news (Miller Exhibit # 3, p. 1; Tr. 466- 468), and she would have reported directly to Mr. Miller, working closely with him in the development of the station's programming (Miller Exhibit # 3, 2).

40. Mrs. Miller was a long term resident within the Gulf Breeze station's grade B contour. As part of her direct testimony, she indicated that she intended to continue to reside within that area in the future (Miller Exhibit # 3, p. 2). As of the date of her testimony, Mrs. Miller served on the Baptist Hospital Foundation Board and was a member of "Les Harlequins," a woman's organization in Pensacola, Florida (Miller Exhibit # 3, p. 2). She was also a former member of the Society of Debutante Cotillion, a local charitable organization, and she was also a former member of the St. Christopher Episcopal Church choir (Miller Exhibit # 3, p. 2). Mrs. Miller also served on several committees for the annual Christmas Caravan Tour of Homes, a local charitable fund drive which conducts tours of homes in the Pensacola and Gulf Coast areas (Miller Exhibit # 3, p. 2, Tr. 471). All of these activities occurred within the 1 mV/m contour of the Millers' proposed station.

41. Mrs. Miller does not have any broadcast experience which would entitle any quantitative integration credit awarded Mrs. Miller to qualitative enhancement for past broadcast experience.

Diversification

42. The Millers jointly own, as tenants by the entireties, 51 percent of M&M Communications, Inc. (M&M) (Miller Exhibit # 4, p. 1; Tr. 351). M&M holds Low-Power Television (LPTV) construction permits for Little Rock, Arkansas, and Nashville, Tennessee. It is also the permittee for LPTV stations in San Antonio, Texas, Fresno, California, Jacksonville, Florida, Savannah, Georgia, and Louisville, Kentucky. By an amendment filed June 3, 1987, the Millers indicated that they will divest themselves of their interests in all the LPTV permits, and on July 29, 1987 their MDS licenses (Joint Stipulation # 1).

43. The Millers are also joint owners of 100% of MDS of Monroe, Inc., the licensee of single-channel MDS station in Monroe, Louisiana and of 50 percent of Hartford MDS Company, the licensee of the Hartford, Connecticut MDS system (Miller Exhibit # 4, p. 1). In addition, the Millers jointly own 51 percent of Multi-Communications Services, Inc. which is the licensee of a single-channel MDS station in Erie, Pennsylvania, and a minority venturer in the Channel 2 MDS licensee in Miami, Florida and Atlanta, Georgia (Miller Exhibit # 4, p. 1). Individually and through Multi-Communications Services, Inc., the Millers own less than a 10 percent interest in Contemporary Communications Corp. which is the licensee and permittee of a number of MDS stations (Miller Exhibit # 4, p. 1; Tr. 440). Mr. and Mrs. Miller are also 100 percent owners of *TV Facts*, a weekly publication published in Pensacola, Florida that lists television programs (Tr. 368).

44. As stated above, the Millers own their LPTV interests through M&M. All of these interests were acquired after the so-called "B" cut-off date. The Millers reported the grants of San Antonio, Texas, Fresno, California, Jacksonville, Florida, Savannah, Georgia and Louisville, Kentucky LPTV applications on June 3, 1987 (see *Order*, FCC 87M-2582). Their application was further amended pursuant to a Petition for Leave to amend filed on February 9, 1988 to further reflect the grant of a construction permit for an LPTV station in Albany, Georgia on September 28, 1987 and one for Winston-Salem, North Carolina on September 22, 1987 (see *Order*, FCC 88M-560). The Millers subsequently amended their application on May 11, 1988 to reflect that M&M no longer owned the LPTV station in Nashville, Tennessee, and that it had allowed the LPTV construction permit for Louisville, Kentucky to lapse (see *Order*, FCC 88M-1983).

Conclusions of Law

45. The Millers applied for the Gulf Breeze, Florid license initially as an oral general partnership to whic they both had equal shares. There is no written documentation setting forth the rights and obligations of either Mr. Miller or Mrs. Miller. Although they subsequently changed the nature of the entity to two individuals with the right of survivorship, for our purpose here, the entity will remain an oral general partnership with each partner holding a 50 percent interest in the enterprise. The conversion to a tenancy by the entireties, assuming that it is legally binding, was reportedly done for estate planning purposes and has no effect on the comparative standing or evaluation of the Miller applicant. To permit Mr. Miller to claim a 100 percent ownership on the basis of this right of survivorship would constitute an impermissible comparative upgrade.

46. Mr. Miller was 73 years old at the time of the hearing, (Tr. 343). He indicated that he sold station WCOA, Pensacola, Florida to explore the notion of being semi-retired (Tr. 402) and that he was in semi-retirement for approximately 13 years (Tr. 402). Although he presently manages, administers and supervises the construction of his cellular telephone systems in Green Bay, Wisconsin and Binghampton, New Jersey, as well as low power television and MDS interests along with other business interests, together they do not constitute a full-time activity. After many years of semi-retirement, Mr. Miller proposes to be integrated full-time, working more than 40 hours a week, as the proposed station's General Manager.

47. The Presiding Judge concludes that it is simply not credible to believe that a man of Mr. Miller's age, after so many years of semi-retirement, would assume the responsibilities of working at the station on a full-time basis. It is

far more likely that Mr. Miller will devote only a limited amount of time to sales and that he will entrust actual management of the station to a paid employee. The Presiding Judge concludes, therefore, that Mr. Miller is entitled to a part-time integration credit for his proposal to work as Sales Director, which is qualitatively enhanced by his long term residence within the service area with some civic involvement and by his prior broadcast experience.

48. Mrs. Miller testified that as joint owner of the proposed station she will participate with her husband in its management. She indicated, however, that she would defer to her husband in matters of policy and that Mr. Miller would make the decisions affecting the station (Tr. 457). In the past, Mrs. Miller has not been involved to a significant degree in the Millers' enterprises. She did not, for example, take any active role in the Miller low power-TV projects (Tr. 487-488) or the cellular radio and multipoint distribution service companies (Tr. 488). With respect to radio station WCOA which she owned jointly with her husband, her only task was to monitor certain stations and inform her husband when the stations strayed from their proscribed format (Tr. 457-58). She had, however, the responsibility of keeping the books for the various Miller enterprises, and preparing the income tax records on an "on-going basis" which she testified required two full days a week (Tr. 458-459).

49. According to her testimony, her duties as business manager and music director will include the hiring of bookkeeping and clerical help (Tr. 466), overseeing the bookkeeping (Tr. 484), as well as assisting or helping to oversee a secretary-receptionist (Tr. 467) and a production person who would produce sports or have something to do with music (Tr. 467). She would also choose the station's format (Tr. 468), but there would be a program director (Tr. 492) who, along with some of the announcers, would select the music (Tr. 491). Although Mr. Miller testified that it would be his intention to consult with Mrs. Miller in areas that applied to her, and that she would be in charge when he was away (Tr. 405), Mrs. Miller indicated that Mr. Miller would make all the decisions on matters of policy at the station (Tr. 457) and that she would report to the program director (Tr. 492) but at the same time, apparently, supervise the activities of the program director (Tr. 491).

50. Mrs. Miller's description of her duties at the station was so vague as to draw into question whether or not she had a definite idea of what they would involve. She appeared to assign to herself a hands-off role which contradicts her claim for integration credit. The Presiding Judge found the proposal to be not only nebulous, but also very unlikely to be effectuated. Therefore, Mrs. Miller's integration pledge is found not to be credible, and the Millers are not entitled to any integration credit for Mrs. Miller.

Diversification

51. By an amendment filed June 3, 1987, the Millers reported the grant of five LPTV stations: Channel 67, San Antonio, Texas, granted June 9, 1986; Channel 2, Fresno, California, granted July 13, 1987; Channel 38, Jacksonville, Florida, granted March 31, 1986; Channel 34, Savannah, Georgia, granted February 27, 1987; and Channel 60, Louisville, Kentucky, granted August 7, 1986. The divestiture commitment was 11 months late for the San Antonio, Texas facility; 13 months late for the Jacksonville, Florida station; 3 months late for the Savannah, Georgia LPTV facility; and 9 months late for the Louisville, Kentucky facility. The Millers' divestiture commitment for all of their MDS interests was made for the first time on July 29, 1987, more than 4 years after the grant of the Monroe MDS' application, more than 5 years after the grant of the Hartford MDS Company's application, and more than 4 years after the grant of the Multi-Communications Services applications. The Millers failed to make a timely commitment to divest their magazine *TV Facts*.

52. In order not to be charged with a diversification demerit, a commitment to divest must be made by the "B" cut-off date. As noted above, the Millers did not make a timely commitment to divest themselves of any one of these interests, and they are, therefore, chargeable to their application. The representations set forth in their direct exhibits that they will divest themselves of their LPTV and MDS interests is insufficient to eliminate these interests from an evaluation of their comparative standing.

53. From the evidence of record, it does not appear that *TV Facts* is a significant media interest since it has little editorial content. The Millers' ownership of this publication is, therefore, of minor significance. Similarly, the broadcast facilities in which the Millers hold an interest are located at a considerable distance from Gulf Breeze, Florida and are also of only very minor comparative significance.

GULF BREEZE BROADCASTING COMPANY

Findings of Fact

54. Gulf Breeze is a general partnership comprised of Galen D. Castlebury, a 40 percent partner; Helen L. Castlebury, also a 40 percent general partner; and Nadine L. Meade, a 20 percent general partner (Gulf Breeze Exhibit # 1, p. 1).

Galen D. Castlebury

55. Mr. Castlebury will serve as the station's General Manager working full-time or 40 hours a week (Gulf Breeze Exhibit # 2, p. 1). As General Manager, he will be responsible for the overall operation of the station. All management personnel will report directly to him, and he, along with Nadine Meade and Helen Castlebury, will establish station policy (Gulf Breeze Exhibit # 2, p. 1).

56. Mr. Castlebury resided in Gulf Breeze, Florida from May 1985 until May 1988 when he moved to New Jersey. He has indicated that he intends to return to Gulf Breeze within 18 months or earlier if Gulf Breeze is awarded the construction permit. *See* Amendment filed on June 6, 1988, received by *Order* (FCC 88M-2025) released June 29, 1988 (Gulf Breeze Exhibit # 2, p. 2). Since 1985, Mr. Castlebury has been a member of the following organizations: the Gulf Breeze United Methodist Church; the Gulf Breeze Masonic Lodge 347; the Pensacola Scottish Rite; the Pensacola Veterans of Foreign Wars Post 706; the American Legion Post 240, Pensacola, Florida; the Pensacola Elks 0497; and the Radio Amateur Emergency Radio Club, Escambia and Santa Rosa, Florida. From 1987 to the present, he has also been a member of Gulf Breeze-Tiger Point Kiwanis Club, as well as, serving as its President since 1987 (Gulf Breeze Exhibit # 2, p. 3). By an Amendment received by *Order* released on October 17,

1988, Gulf Breeze reports that Mr. Castlebury is no longer President of the Gulf Breeze-Tiger Point Kiwanis Club (see *Order* FCC 88M-3427).

57. Mr. Castlebury has been involved in radio broadcasting for more than 30 years. He began as a full-time announcer and engineer for station WKBI, St. Mary, Pennsylvania, and between 1956 and 1984, he served as a General Manager as well as Chief Engineer at WMPT, and WMPT (FM), South Williamsport, Pennsylvania, and as General Manager for WKAD-FM, Canton, Pennsylvania between 1979 and 1983 (Gulf Breeze Exhibit # 2, p. 2).

Helen L. Castlebury

58. Mrs. Castlebury will be employed as the station's full-time Station Manager, working at least 40 hours a week supervising and managing station operations. She will also have primary responsibility for programming and production. Mrs. Castlebury will meet regularly with Nadine Meade and Galen Castlebury to discuss and establish station policy (Gulf Breeze Exhibit # 4, 1).

59. Mrs. Castlebury has been a resident of Gulf Breeze, Florida from May 1985 until May 1988, when she moved to New Jersey with her husband. She has also indicated her intention to return to Gulf Breeze in 18 months or earlier if Gulf Breeze is awarded the construction permit (see Petition for Leave to Amend filed June 14, 1988, received by *Order* released on June 29, 1988, FCC 88M-2025). Mrs. Castlebury has been a member of the Gulf Breeze United Methodist Church since 1985, and from 1987 to the present of the Gulf Breeze Kiwanis Club. During the year 1987, she briefly performed volunteer work for the Salvation Army (Gulf Breeze Exhibit # 4, p. 1).

60. Mrs. Castlebury has no prior broadcast experience which would qualify her integration proposal for qualitative enhancement.

Nadine Meade

61. Mrs. Meade will be employed full-time, a minimum of 40 hours a week, as the station's Director of Sales. She will be responsible for managing the station's local and national sales and she will directly supervise a staff of sales people. Mrs. Meade will meet regularly with Helen and Galen Castlebury to discuss and establish station policy (Gulf Breeze Exhibit # 3, p. 2).

62. Mrs. Meade has been a resident of Gulf Breeze, Florida since 1977 (Gulf Breeze Exhibit # 3, p. 2). She has been a member of St. Sylvester Catholic Church of Gulf Breeze, Florida since 1981 and the Santa Rosa Shores Homeowners Association since 1983. Mrs. Meade has also been a member of the Homeowners Association Smugglers Cove, Gulf Breeze since 1985. Between 1978 and 1981, Mrs. Meade was a member of the Seville Square Merchants Association, Pensacola, Florida, and as a Gulf Breeze Century 21 employee, Mrs. Meade participated in an annual Lend-A-Hand Program (Gulf Breeze, Exhibit # 3, p. 2).

63. Mrs. Meade has no prior broadcast experience.

Diversification

64. Neither Gulf Breeze Broadcasting Company nor its principals, Mr. Castlebury, Mrs. Castlebury and Mrs. Meade, have any attributable interest in any medium of mass communications (GBBL Exhibit # 2, p. 2; Exhibit # 3, p. 2; and Exhibit # 4, p. 2).

Conclusions of Law

65. As noted above, Gulf Breeze is a general partnership with the Castleburys owning 40 percent each of the entity and Mrs. Meade the remaining 20 percent. The partnership agreement sets forth the parties' intention to form a corporation at a later date, sometime before the construction of the station (Gulf Breeze Exhibit # 1). The agreement further indicates that the corporation will be formed "with the above points in mind" (Gulf Breeze Exhibit # 1). An amendment signed by all of the partners and effective as of June 27, 1985, makes it clear that in the event that the partnership is converted to a corporation, "the ownership interests and voting rights will remain as stated in the partnership's agreement" (Gulf Breeze Exhibit # 1, 627, 741-742). The partnership agreement, as amended, provides the necessary assurance that the ownership interests of all partners will remain the same in the event that the entity is converted to a corporation. Any award of quantitative integration credit to Gulf Breeze will be based on the percentages of ownership set forth above.

66. Mr. Castlebury is an experienced broadcaster. With respect to the proposed station in Gulf Breeze, Mr. Castlebury will serve both as General Manager and Chief Engineer. Initially, he will devote 100 percent of his time to his duties as Chief Engineer and then gradually reduce that amount to 10 percent with 90 percent of his time committed to his role as General Manager (Tr. 645).

67. Mr. Castlebury moved to Gulf Breeze in May, 1985. He was not regularly employed until July 1987. By an amendment filed on June 13, 1988, Mr. Castlebury informed the Commission that he had moved back to Pennsylvania. Although he promises to return to Gulf Breeze in the event that his application is successful, for comparative purposes he can no longer be considered a local resident. The record demonstrates some involvement in the past in the civic affairs of the Gulf Breeze area. However, Mr. Castlebury's activities with these groups occurred for the most part after the B-cut-off date. Specifically, he did not become a member of the Gulf Breeze United Methodist Church's Central Committee until after September 13, 1985, the deadline for comparative improvement in this proceeding (Gulf Breeze Exhibit # 2, p. 3; Tr. 514). Furthermore, he was not a member or president of the Gulf Breeze-Tiger Point Kiwanis until the Fall of 1987 (Tr. 515) and he held no leadership position with the Gulf Breeze Masonic Lodge (Tr. 519-520) or the Scottish Rite (Tr. 520). Mr. Castlebury was unsure whether his membership in the Pensacola Elks Club was transferred before September 1985 (Tr. 520-521). However, he did join the Radio Amateurs Emergency Radio Club, Escambia and Santa Rosa, Florida sometime in the Spring of 1985 (Tr. 521). Accordingly, Mr. Castlebury's civic activities in the Gulf Breeze area, for comparative purposes, are considered to be of only very slight significance.

68. The Gulf Breeze partnership agreement originally set forth Mrs. Castlebury's position as Office Manager. The amendment to the agreement which became effective

on June 27, 1985, but was executed on or about June 28, 1987, (Tr. 582) changed her job description to Station Manager. Mrs. Castlebury described her duties as mostly paperwork and other office functions (Tr. 715) further indicating that she will be in charge of personnel and will fire employees if they are not doing their job (Tr. 728). Although she intends to differ to her husband on matters of policy, she testified that along with Mr. Castlebury and Mrs. Meade, she will help in establishing station policy (Gulf Breeze Exhibit # 2, p. 1).

69. The Presiding Judge did not find Mrs. Castlebury's claim of a management role at the station to be credible. She described her duties in very vague terms. Although she indicated that she will hire, fire and supervise employees, her testimony lacked conviction, and it is clear, from a reading of her entire testimony, that she will perform mostly office functions and differ on a regular basis to her husband on all matters of substance. Her role at the proposed station, as she described it, bears a strong resemblance to the position that she held at station WMPT, South Williamsport, Pennsylvania, where she, for the most part, answered the phone and performed other desk duties. The change in her job description from Office Manager to Station Manager was a clear attempt to reinforce a claim for a management role for Mrs. Castlebury at the Gulf Breeze facility by exaggerating her past broadcast experience. Mr. Castlebury's testimony that he introduced her at station WMPT as the Station Manager when, by Mrs. Castlebury's own admission, she did little else than answer the phone, is an obvious attempt to inflate Mrs. Castlebury's position at that station in order to make her proposal of a management role at the Gulf Breeze facility more credible. The conclusion is inescapable that there has been a concerted effort on the part of the applicant to claim a more significant role for Mrs. Castlebury then she will actually fill. Accordingly, Gulf Breeze will not receive an integration credit for Mrs. Castlebury since the record fails to disclose that she will be integrated into a management position at the station.

70. Mrs. Meade proposes to serve as the station's sales manager. At present, she is a real estate broker in the Gulf Breeze area. She indicated that she will stop selling real estate but will not give up her brokerage license in the event that Gulf Breeze is the successful applicant. Her license will be placed in inactive status (Tr. 676), but she will remain officially with her real estate company and continue to meet the educational requirements of her brokerage license (Tr. 676). Mrs. Meade did not rule out the possibility of returning to her real estate practice if she is not paid a salary for her work at the station (Tr. 658). However, she has already informed her employers that she plans to work full-time at the station (Tr. 681) and she has no intention to sell real estate on the side (Tr. 679-680). The Presiding Judge concludes that there is absolutely no basis on the record to dispute Mrs. Meade's claim that she will work full-time at the Gulf Breeze station. Her refusal to rule out returning to her real estate practice in the event that she is not paid a salary does not negate her integration commitment since sales could be made part-time while still working 40 hours a week at the station. On the basis of the evidence of record, the Presiding Judge finds that Mrs. Mead's commitment to work at the station on a full-time basis is credible, and that her duties, as described on the record, warrant a credit for integration of ownership into management. Her quantitative integration credit of 20 percent is qualitatively enhanced by her residence within the service area of the proposed station and by her gender. Mrs. Meade's involvement in civic affairs has been extremely limited and she has no prior broadcast experience. Her integration credit is not, therefore, entitled to any further enhancement except for the credits noted above.

71. The inconsistencies between Mr. Castlebury's testimony and that of his wife as to her role at station WMPT, South Williamsport, Pennsylvania and her title, if any, and their reason for moving to Florida; Mr. Castlebury testified that it was to acquire another broadcast facility whereas Mrs. Castlebury's indicated that they intended to retire (Tr. 619, 739); and Mr. Castlebury's testimony as to the date an amendment was prepared (Tr. 570) are troublesome since they draw into question the Castleburys' forthrightness. However, they are not sufficiently egregious to warrant either further inquiry as the Castleburys' candor and truthfulness or to merit Gulf Breeze's disqualification.

Diversification

72. Gulf Breeze and its principals have no cognizable interest in any medium of mass communications.

COMPARATIVE COVERAGE

73. The four applicants have stipulated that there is no area within the 60 dBu contour proposed by any one of the applicants which does not receive at least five (5) full-time aural commercial services, not including the services proposed herein (Joint Exhibit # 1, p. 5). Accordingly, none of the applicants is entitled to any preference for service to underserved areas and populations. Breeze will serve 23,602 (14.02%) more people than Miller, 9,914 (5.45%) more than Maranatha and 10,314 (5.68%) more than Gulf Breeze. Accordingly, Breeze is entitled to a very slight preference over the other applicants under this issue (see Susan E. Mulkey, 3 FCC Rcd. 590, 593 (1988).

Auxiliary Power

74. Each applicant proposes auxiliary power at both their proposed studio and transmitter site (Gulf Breeze Exhibit # 2, p. 4; Breeze Exhibit # 1, 3; Miller Exhibit # 5, p. 1; Maranatha Exhibit # 2, p. 1). No applicant is, therefore, entitled to an auxiliary power preference.

ULTIMATE CONCLUSIONS

75. Breeze is the only applicant whose integration proposal is found to be totally credible. It has been awarded a 100 percent quantitative integration credit which is qualitatively enhanced by the Phillips' intention to move to Gulf Breeze, Florida, by Mrs. Phillips gender and by their past broadcast experience. Its nearest competitor is Gulf Breeze with a 60 percent part-time quantitative integration credit followed by the Millers with a 50 percent part-time quantitative integration credit. Maranatha does not propose any integration. The Breeze proposal is not subject to a diversification demerit of any degree and it is further entitled to a very slight preference over the other applicants for superior coverage. Accordingly, the Presiding Judge finds that Breeze's proposal is superior to that of the other applicants and that a grant of its application would best serve the public interest.

RULINGS

76. IT IS ORDERED that the Petition for Leave to Amend filed on December 10, 1988 IS GRANTED, and the amendment IS ACCEPTED for reporting proposes only.

77. AND IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Breeze Broadcasting Company, Ltd. (File No. BPH-840503IC) for authority to construct a new FM station or Channel 237A in Gulf Breeze, Florida IS GRANTED; and that the applications of Maranatha Broadcasting Company, Inc. (File No. BPH-850712ME), J. McCarthy and June J. Miller (File No. BPH-850712NT) and Gulf Breeze Broadcasting Co. (File No. BPH-850712OE) ARE DENIED.[6]

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

FOOTNOTES

[1] The application of Gulf Breeze Wireless Company was dismissed with prejudice for failure to prosecute by *Order* FCC 88M-257, released February 3, 1988; the application of Delta Broadcasting Corporation was dismissed voluntarily, by *Order* FCC 87M-2579, released October 16, 1987; the application of Stacey Pepper-Wrenn and David Wrenn, a partnership, was dismissed, voluntarily by *Order* FCC 87M-2578, released October 16, 1987; the application of Timothy Paul Woodward was dismissed voluntarily, by *Order* FCC 87M-2577, released October 16, 1987; and the application of Harold S. Schwartz was dismissed voluntarily, by *Order* FCC 87M-2576, released October 16, 1987. The applications of Gail Rose Schroeder, Sherry Ann Scott, Gulf Breeze FM Group Limited Partnership, Dee Wetmore, J-4 Broadcasting, Ltd. and Gulf Radio, Ltd. were dismissed, by *Order* FCC 87M-1611 released July 10, 1987. The application of Timothy L. Chisholm and Lisa Chisholm was dismissed for failure to prosecute, by *Order* FCC 88M-585, released March 2, 1988.

[2] *Id.*

[3] *Id.*

[4] By an amendment to the partnership agreement dated March 7, 1988, Breeze amended its partnership agreement by indicating specifically with respect to Article II, pp. 3 that " . . . neither limited partner may act as an employee of the partnership if his or her functions, directly or indirectly, relate to the media enterprises of the partnership;" serve "in any material capacity, as an independent contractor or agent with respect to Breeze's media enterprises, nor communicate with the general partners on matters pertaining to the day-to-day operations of the proposed station; . . . to the extent the limited partnership agreement permits any limited partner to vote on the admission of a new general partner, the general partners are empowered to veto any such admissions; . . . the limited partners are prohibited from voting on the removal of a general partner; . . . the limited partners are barred from performing any services to the limited partnership materially relating to its media activities; . .. the limited partners are expressly prohibited from becoming actively involved in the management or operation of the media businesses of the partnership" (Breeze Exhibt 8, p.1-2).

[5] The Presiding Judge was advised by an amendment filed on January 9, 1989 that Mrs. Miller died on December 10, 1988.

[6] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTERNATIONAL SATELLITE, INC.	File Nos. CSS-83-004-P(LA) I-P-C-83-073
FINANCIAL SATELLITE CORPORATION	File No. CSS-85-004-P-(LA)

Requests for One-Year Extension of Time to Demonstrate Financial Qualifications to Construct and Operate International Satellite Communications Systems.

MEMORANDUM OPINION AND ORDER

Adopted: December 15, 1989; Released: January 3, 1990

By the Chief, Common Carrier Bureau:

1. International Satellite, Inc. (ISI) and Financial Satellite Corporation (FINANSAT) have filed requests for a one-year extension of the time limit set for demonstrating permanent financial qualifications for construction, launch and operation of their conditionally authorized international separate satellite systems. No comments were received about the requests.

2. ISI is the holder of a conditional authorization to construct and operate a private, North Atlantic regional satellite system for the provision of international communications services between the United States and Western Europe.[1] FINANSAT holds a conditional authorization to construct and operate a private, international satellite system to provide international communications services between the Atlantic and Pacific Ocean regions by interconnections through a network control center located in the United States.[2]

3. ISI's conditional authorization has been extended on two previous occasions. [3] In support of this request, ISI states that despite diligent efforts, it has been unable during the previous extensions to overcome the pervasive entry barriers in the European market. In the period since the Commission granted its last extension request, ISI explains that it has continued its efforts to build a strong base of potential U.S. and European customers, to prepare, construct and launch its system, and to make arrangements with European administrations. According to ISI, it has improved upon and redesigned the proposed ISI satellite, incorporating the latest, most efficient technology. It states that it also is redesigning the spacecraft to make it compatible with multiple commercially available launch vehicles. ISI claims it has secured an Ariane-IV launch option with financing from one of its principal investors and that discussions with other launch service providers are continuing. During the past year the ownership of ISI has changed significantly and major acquisitions by the company in control of ISI have been completed, both of which lead ISI to believe that it may be able to make faster progress. ISI also states it has had some limited success in discussions with U.K licensees who have been awarded Special Satellite Service Operator's licenses for domestic U.K. satellite service. It also believes it may be possible to enter into business arrangements in the near future with one or more of the licensees who are currently petitioning for other expanded services, for which ISI says it is ideally suited. ISI submits that it remains committed and optimistic, but is not now able to present agreements sufficiently firm to satisfy the Commission's requirements for an unconditional construction permit. Therefore, ISI requests a further extension, on the basis of its continuing efforts and developing circumstances, and in light of the well known political difficulties with which separate system permittees have had to contend during the prior extension period.

4. FINANSAT's conditional authorization has been extended on two previous occasions.[4] In support of this request, FINANSAT states that it has diligently continued its efforts to implement its proposed satellite systems during the past one-year period since the Commission granted its extension request for demonstrating second stage financial qualifications. Among these efforts according to FINANSAT are continued meetings with foreign operating authorities in the Americas, Far East and Europe; extensive technical and business consultations with potential domestic and foreign customers and equipment suppliers; and further refinements to its business plan to reflect changed circumstances. FINANSAT claims, however, that it has been delayed in meeting the Commission's requirements by several developments beyond its control. It states that INTELSAT's recent determination that the Orion system could cause economic harm to INTELSAT creates additional concern because potential FINANSAT customers and joint venturers have raised new questions about FINANSAT's chances unconditionally to achieve successful coordination with the INTELSAT system. Although FINANSAT is confident it can achieve such coordination, it notes that these questions have required more attention and time to address them than was anticipated. FINANSAT claims that over the past year, it has made substantial advances in negotiations with foreign telecommunications service providers and new potential customers. As a result of this progress, FINANSAT states it is currently engaged in serious discussions with a major U.S. satellite manufacturer as well as the appropriate launch vehicle providers and space insurance firms so as to optimize FINANSAT's overall business plan. Based on its extensive efforts and substantial progress in the past year, FINANSAT expects that it will be able to obtain the necessary operating agreements, successfully initiate INTELSAT consultation and obtain adequate financing within the current year if granted an extension of its conditional authorization.

DISCUSSION

5. In 1985, the Commission determined that the public interest would be served by grant, under certain terms and conditions, of authorizations for international satellite systems separate from INTELSAT.[5] Recognizing the unique institutional and commercial obstacles to be faced by separate system applicants, the Commission adopted a two-part financial qualifications test. At the application stage, applicants are required to provide an estimate of

start-up costs, costs of construction, launch and operation of their systems for a period of one year and potential or actual source of funding.[6] The Commission stated that it would grant a conditional construction permit upon such a showing, allowing the applicant to defer until later a demonstration that funds were available to operate the proposed system. Specifically, the applicants must demonstrate sufficient non-contingent funds to meet the costs of construction and launch and operating expenses for one year after launch. The Commission required the applicants to file this demonstration no later than 60 days after the date on which the Commission received notification from the Department of State, with regard to a particular separate systems applicant, that the United States had fulfilled its obligations under Article XIV(d) of the INTELSAT Agreement.[7]

6. Upon reconsideration of the Separate Systems decision, the Commission affirmed the two-part financial qualifications test, but imposed on all conditional authorizations a one-year limitation for the second-stage financial showing.[8] The Commission noted, however, that applicants might extend their authorizations beyond the one-year limit through a good faith showing of diligence in seeking to establish their proposed systems.[9]

7. We recognize the unique circumstances applicants must face in implementing separate international satellite systems. As part of the first U.S. initiative in the area of separate international satellite systems, applicants may experience difficulties in securing agreements with a foreign correspondent for use of the system. Once this has been accomplished, the applicant must complete the INTELSAT Article XIV(d) consultation process, considering whether the separate system will cause either technical or significant economic harm to the global system. Based on the representations contained in their requests for extension before us, we find that ISI and FINANSAT have demonstrated that they are making all reasonable efforts to establish their systems. Consequently, we find that good cause exists to grant ISI and FINANSAT a one-year extension of their conditional authorizations for the demonstration of permanent financial qualifications.

8. Accordingly, IT IS ORDERED that the requests of ISI and FINANSAT for a one-year extension of time to demonstrate permanent financial qualifications ARE GRANTED and ISI and FINANSAT must file within one year from the release date of this order all necessary information to meet the Commission's full financial requirements for the operation of their international satellite systems.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] International Satellite, Inc., 101 FCC 2d 1201 (1985). ISI's satellites are to be located at 56 and 58 degrees W.L., respectively.

[2] Financial Satellite Corporation, File No. CSS-85-004-P(LA), FCC 86-13 (released Jan. 15, 1986). FINANSAT's satellites are to be located at 47 and 178 degrees W.L., respectively.

[3] *See* International Satellite, Inc., *et al.*, 2 FCC Rcd 4209 (1987); and 3 FCC Rcd 5839 (1988).

[4] *Id.*

[5] Establishment of Satellite Systems Providing International Communications, 101 FCC 2d 1046 (1985).

[6] *Id.* at 1165.

[7] *Id.* at 1165-1166.

[8] Establishment of Satellite Systems Providing International Communications (Separate Systems Reconsideration), FCC 86-144 (released Apr. 17, 1986).

[9] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-618

In the Matter of

Amendment of Section 73.202(b),	RM-6133
Table of Allotments,	RM-6912
FM Broadcast Stations	
(Fort Rucker and Geneva, Alabama;	
Blakely, Georgia)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 7, 1989; Released: January 3, 1990

By the Chief, Allocations Branch:

1. This proceeding began with a *Notice of Proposed Rule Making*, 3 FCC Rcd 380 (1988) (" *Notice* "), proposing the deletion of FM Channel 226A at Fort Rucker, Alabama, in response to a petition for rule making filed by the United States Army Aviation Center (petitioner), Fort Rucker, Alabama.[1] Westar Broadcasting Company ("Westar"), Rucker Radio ("Rucker"),[2] and Sky Way Broadcasting, Inc. ("Sky Way") filed comments opposing the deletion of the Fort Rucker channel. Shelley Broadcasting Company, Inc. ("Shelley"), licensee of Station WRJM-FM, Channel 228A, Geneva, Alabama, filed comments supporting the deletion of the Fort Rucker channel and a counterproposal proposing the substitution of Channel 229C1 for Channel 228A at Geneva and the modification of its license for Station WRJM-FM to specify the new channel. To accommodate the Geneva substitution, Shelley proposes the substitution of Channel 226A for Channel 228A at Blakely, Georgia, and modification of the license of Radio Blakely, Inc. ("Radio Blakely"), for Station WBBK-FM, Channel 228A, Blakely, to specify the new channel. [3] Shelley and Rucker filed reply comments.[4]

2. Westar, Rucker, and Sky Way oppose the deletion of the Fort Rucker allotment.[5] Conceding petitioner's claim that no available site could provide city grade coverage to all of the Fort Rucker military base, Rucker argues that a waiver of the city grade coverage requirement is warranted because the base is extremely large, and the populated area of the base would receive the required city grade coverage. Westar claims that a transmitter mounted on an existing tower could provide city grade coverage to the populated area of the base. Sky Way claims that Fort Rucker qualifies as a community for allotment purposes.

3. In reply, Shelley argues that Fort Rucker is not a community for allotment purposes. Shelley claims that Fort Rucker is a closed, restricted military installation and is therefore unlike communities consisting of an army base and a closely associated civilian city. Shelley also maintains that minimally acceptable city grade coverage cannot be provided to Fort Rucker. Shelley claims that in *Report and Order* (*Greenwood et al., South Carolina, and Biltmore Forest, North Carolina*), 2 FCC Rcd 3583 (1987), the Mass Media Bureau stated that city grade coverage of the community of license must must be possible or an allotment would not be approved for that community. Shelley notes that both Sky Way and Rucker, applicants for the allotment, claim that they would not be able to provide all of Fort Rucker with city grade coverage.

4. In its reply, Rucker argues that Shelley's counterproposal should not be favored over the Fort Rucker allotment. Rucker notes that the Fort Rucker allotment provides a first local service, whereas Shelley's counterproposal would result in an expansion of an existing service. Furthermore, Rucker claims that Fort Rucker has a greater population than Geneva.[6]

5. After the close of the pleading cycle, Shelley submitted supplemental pleadings suggesting that Channel 263A could be substituted for Channel 226A at Fort Rucker, and Channel 226A for Channel 228A at Blakely, to accommodate its counterproposal for a Geneva upgrade. Although captioned as a counterproposal by Shelley, we note that each of the communities and license modification requests included in Shelley's pleading was a part of this proceeding on the initial comment date. Therefore, the "counterproposal" was in fact merely a supplemental pleading.[7,8]

6. We issued an *Order to Show Cause*, 4 FCC Rcd 7118 (1989) (" *Order* "), ordering Radio Blakely to show cause why its license should not be modified to specify operation on Channel 226A instead of Channel 228A. Radio Blakely submitted a statement that it does not object to the modification provided that it is compensated by Shelley for the modification.[9]

7. In response to the *Order to Show Cause*, Crestview Broadcasting Company, Inc. ("Crestview"), licensee of Station WAAZ-FM, Channel 284C2, Crestview, Florida, filed comments objecting to the substitution of Channel 263A for Channel 226A at Fort Rucker. Crestview requests issuance of a further notice of proposed rule making. Crestview states that on August 16, 1989, it filed a petition for rule making seeking the substitution of Channel 284C1 for Channel 284C2 at Crestview and the substitution of Channel 263A for Channel 285A at Ozark, Alabama, to accommodate the Crestview substitution. The Ozark substitution is mutually exclusive with the Fort Rucker substitution described in the *Order to Show Cause*. Crestview claims that the Commission must issue a *Further Notice of Proposed Rule Making* to comparatively consider its proposal with the proposal in this proceeding, citing to *Memorandum Opinion and Order* (*Ponte Vedra Beach, Florida*), 4 FCC Rcd 843 (1989), *recon. granted on other grounds*, 4 FCC Rcd 5369 (1989).

8. We believe the public interest would be served by retention of an allotment at Fort Rucker as that community's first local FM service. Fort Rucker is a Census Designated Place ("CDP"). Designation of a community as a CDP raises a strong presumption of community status. Shelley challenges the community status of Fort Rucker solely on the grounds that it is a restricted military installation. However, we note that the Commission has previously determined that a military base can be a community for allotment purposes. *See Notice of Proposed Rule Making* (Camp Lejeune, North Carolina), 42 Fed. Reg. 45002 (Broadcast Bur. 1977).[10] Shelley has failed to convince us that we should deviate from this

precedent. Accordingly, we will not delete the Fort Rucker allotment on the grounds that the area is not a community.

9. Both applicants for the Fort Rucker allotment requested a waiver of Section 73.315 of the Commission's rules, claiming that the populated areas of the base can be served from their proposed sites. We believe that the public interest requires that the waiver requests be fully considered during the application process.[11] We note, however, that had the question of city grade coverage been raised when we allotted the channel to Fort Rucker, we would have been inclined to grant a waiver, given the factual record developed.

10. We will not consider Crestview's petition in this proceeding because it constitutes an untimely counterproposal to the proposal described in the *Notice*. Crestview's petition requires the substitution of Channel 263A for Channel 285A at Ozark, which would preclude the substitution of Channel 263A at Fort Rucker as proposed in the *Order*.[12] This, in turn, would require either the denial of Shelley's counterproposal or the deletion of the Fort Rucker allotment.[13] Therefore, Crestview's petition is mutually exclusive with Shelley's timely filed counterproposal in this proceeding. Paragraph 3(b) of the standard Appendix to all allotment *Notices* states that a petition filed after the initial comment date in a proceeding that conflicts with the proposal(s) in that proceeding will not be considered in connection with the decision in that proceeding. Crestview's petition was filed long after the deadline passed for filing counterproposals to this proceeding. Accordingly, we will not consider Crestview's petition in connection with this docket.[14]

11. Retention of the Fort Rucker allotment does not preclude adoption of Shelley's proposal. A staff analysis confirms that Channel 229C1 could be allotted to Geneva, thereby providing the area surrounding that community with an expanded FM service, if Channel 263A is substituted for Channel 226A at Fort Rucker and if Channel 226A is substituted for Channel 228A at Blakely. Therefore, we will substitute Channel 229C1 for Channel 229C2 at Geneva and modify the license of Station WRJM-FM accordingly.[15] We will also substitute Channel 226A for Channel 228A at Blakely and modify the license for WBBK-FM accordingly to accommodate the Geneva substitution.[16] Channel 263A at Fort Rucker may be used at the transmitter sites specified by the applicants for the allotment.[17] Finally, we note that Shelley has acknowledged its responsibility to reimburse Station WBBK-FM for the reasonable and prudent expenses Station WBBK-FM will incur in changing to another Class A channel.

12. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 20, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Fort Rucker, Alabama	263A
Geneva, Alabama	229C1
Blakely, Georgia	226A

13. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Shelley Broadcasting Company, Inc., for Station WRJM-FM, IS MODIFIED effective **February 20, 1990** to specify operation on Channel 229C1 in lieu of Channel 229C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

14. IT IS FURTHER ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, the license of Radio Blakely, Inc., for Station WBBK-FM at Blakely, Georgia, IS MODIFIED, effective **February 20, 1990,** to specify operation on Channel 226A in lieu of Channel 228A subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license BLH-850313KS except the channel as specified above. Any other changes, except those so specified under Section 73.6120 of the Rules, requires prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provision of Section 73.1620 of the Rules, provided the transmission facilities comply in all respects with license BLH-850313KS except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

15. IT IS FURTHER ORDERED, That the Secretary SHALL SEND a copy of this Report and Order BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following applicants for Channel 226A at Fort Rucker, Alabama:

Sky Way Broadcasting, Ltd. 205 Walnut Drive Enterprise, Alabama 36330 (BPH-880407NA)	Rucker Radio P.O. Box 1537 Columbus, Georgia 31994 (BPH-880407MJ)

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Eighteen months after the close of the pleading cycle, the Army Spectrum Manager of the Department of the Army ("Spectrum Manager"), submitted a motion to dismiss petitioner's pleadings. The Spectrum Manager states that he is the recognized Army representative in national radio regulatory processes, and that petitioner's comments were submitted erroneously. Based on the Spectrum Manager's motion, Rucker Radio filed a motion to dismiss this docket insofar as it pertains to the deletion of the Fort Rucker allotment. We grant the Spectrum Manager's motion and dismiss petitioner's pleadings in this proceeding.

Petitioner originally requested, and we proposed in the *Notice*, the deletion of Channel 226A at Fort Rucker based on its claims that the antenna for an FM station at Fort Rucker would interfere with aeronautical operations at the base and that no available site could provide city grade coverage to Fort Rucker as required by Section 73.315 of the Commission's rules. Petitioner also argued that Fort Rucker is not an incorporated city with municipal services, but is a restricted military installation. The Spectrum Manager's motion for dismissal of petitioner's pleadings indicates that the Department of the Army does not object to the Fort Rucker allotment. Accordingly, we will not consider pleadings submitted by other parties in this proceeding insofar as they address the potential for interference with aeronautical operations at the base from the Fort Rucker allotment.

However, parties filed timely comments regarding city grade coverage concerns and the community status of Fort Rucker. We resolve these issues by this action.

[2] Rucker filed opposing comments under the name of WGBA, Inc.

[3] Shelley also proposed the allotment of Channel 225A to Midland City, Alabama, to accommodate applicants for the Fort Rucker allotment, but did not express an interest in applying for the channel. Accordingly, Shelley's request will not be further considered.

[4] Rucker filed a motion to strike new matter contained in Shelley's reply comments, arguing that Shelley's discussions of city grade coverage and the community status of Fort Rucker must be disregarded because no commenter discussed that issue, and because Shelley's challenge of the community status of Fort Rucker is untimely. However, two commenters referred to city grade coverage concerns, and one commenter referred to the community status of Fort Rucker, in initial comments. Accordingly, we deny Rucker's motion to strike.

[5] Sky Way (BPH-880407NA) and Rucker (BPH-880407MJ) filed applications for the allotment.

[6] Rucker claims that, according to a handout from the Public Information Office, United States Army, Fort Rucker, the population of Fort Rucker is 20,391 people. The 1980 United States Census states that the population of Fort Rucker is 8,932 people, and the population of Geneva is 4,866 people.

[7] Shelley previously submitted a petition for rule making and request for consolidation proposing the substitution of Channel 269A for Channel 226A at Fort Rucker, and Channel 226A for Channel 228A at Blakely, to accommodate its proposed Geneva upgrade. We returned that petition by letter as technically unacceptable for filing.

[8] Shelley's original counterproposal was placed on public notice August 1, 1989. *See* Report No. 1789 (RM-6912). Shelley filed its substitute motion on July 25, 1989. Rucker filed two petitions for extension of time requesting the extension of the deadline for comments to Shelley's counterproposal from August 16, 1989, to August 30, 1989. Rucker claimed the extension was required in order to address the counterproposal and the substitute motion simultaneously. Because Rucker fails to show good cause as to why we should extend this deadline, we deny Rucker's motions, and will not consider Rucker's reply to comments and counterproposals dated August 30, 1989.

[9] On November 13, 1989, Wolff Broadcasting Corporation ("Wolff") filed a motion for leave to file comments to the proceeding. Rucker filed reply comments. We deny Wolff's motion. Wolff's comments, which urge the deletion of the Fort Rucker allotment or the substitution of an alternate channel at Fort Rucker, are late and fail to state good cause for late filing. They will not be considered in this proceeding.

[10] In that proceeding, we found that Camp Lejeune was a separate community distinct from the neighboring civilian community of Jacksonville, North Carolina. The Commission ultimately denied an allotment to Camp Lejeune because of the preclusive effects of the channel and the Commission's policy against intermixture. *Report and Order* (Camp Lejeune, North Carolina), 43 RR 2d 900 (1978), *aff'd* , 47 RR 2d 1061 (1980). We note that an AM station is currently licensed to Camp Lejeune.

[11] The *Greenwood, South Carolina* case cited by Shelley is inapposite becasue *Greenwood* discusses the Commission's refusal to grant a waiver of the city grade coverage requirement at the allotment, not the application, stage.

[12] Paragraph 3(c) of the Appendix to allotment *Notices* states that the filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

[13] Ordinarily, this conflict would require that we return Crestview's petition as unacceptable for rule making. However, a staff analysis has determined that Channel 284C1 can be substituted for Channel 284C2 at Crestview without requiring the Ozark substitution. Therefore, we are separately issuing a *Notice of Proposed Rule Making* proposing this substitution.

[14] The *Ponte Vedra Beach* case cited by Crestview is distinguishable from the instant proceeding. In that case, consideration of a substitute channel as a way of resolving an ongoing proceeding precluded adoption of another petition filed *before* the initial comment deadline in the proceeding. Here, consideration of a substitute channel for Fort Rucker did not preclude adoption of any timely proposal, since Crestview's petition was filed *after* the initial comment deadline. Crestview's proposal is not entitled to consideration with Shelley's timely counterproposal and, therefore, unlike the situation in the *Ponte Vedra Beach* case, it would serve no useful purpose to issue a further notice of proposed rule making.

[15] Coordinates for Channel 229C1 at Geneva are 31-02-40 and 85-57-34.

[16] Coordinates for Channel 226A at Blakely are 31-20-03 and 84-50-21.

[17] Coordinates for Channel 263A at Fort Rucker are 31-21-55 and 85-40-49, with a site restriction of 2.2 kilometers (1.4 miles) east to avoid a short-spacing to Station WZTZ(FM), Channel 266A, Elba, Alabama. The applicants will be permitted to amend their applications to specify the new channel.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-601

In the Matter of

Amendment of Section 73.202(b), RM-7072
Table of Allotments,
FM Broadcast Stations.
(Chase City, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 12, 1989; Released: January 3, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Patricia B. Wagstaff (petitioner), requesting the substitution of Channel 260C3 for Channel 260A at Chase City, Virginia, and the modification of her construction permit to specify operation on the new channel. Petitioner states an intention to apply for the channel, if allotted.

2. Channel 260C3 can be allotted to Chase City in compliance with the Commission's minimum distance separation requirements at the construction permit's present transmitter site.[1] Therefore, as requested, we shall propose to modify the construction permit for Channel 260A at Chase City to specify operation on Channel 260C3. In accordance with Section 1.420(g) of the Commission's Rules we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Chase City.

3. In view of the fact that Chase City, Virginia, could receive its first wide coverage area FM service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Chase City, Virginia	260A	260C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 26, 1990,** and reply comments on or before **March 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Donald E. Martin, Esq.
Spencer W. Weisbroth, Esq.
Donald E. Martin, P.C.
Suite 200
2000 L Street, N.W.
Washington, D. C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 36-48-13 and 78-21-02.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-602

In the Matter of

Amendment of Section 73.202(b), RM-7154
Table of Allotments,
FM Broadcast Stations.
(Vergennes, Vermont)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 12, 1989; Released: January 3, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Thomas M. Pancoast (petitioner), seeking the allotment of Channel 244A to Vergennes, Vermont, as that community's second local FM service. Petitioner submits information in support of his proposal and states an intention to apply for the channel, if allotted. Channel 244A can be allotted to Vergennes in compliance with the Commission's minimum distance separation requirements.[1]

2. Since the community of Vergennes is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government must be obtained for the proposal.

3. In view of the fact that Vergennes could receive its second local FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Vergennes, Vermont	294C2	244A, 294C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 26, 1990,** and reply comments on or before **March 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Edward W. Hummers, Jr., Esquire
Julie E. Rones, Esquire
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The city reference coordinates are 44-10-00 and 73-15-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-603

In the Matter of

Amendment of Section 73.202(b), RM-7076
Table of Allotments,
FM Broadcast Stations.
(Celina and Watertown, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 12, 1989; Released: January 3, 1990

By the Chief, Allocations Branch:

1. At the request of William O. Barry (petitioner), the Commission has before it for consideration a petition for rule making requesting the reallotment of vacant and unapplied for Channel 229A from Celina, Tennessee, to Watertown, Tennessee. Petitioner expressed an interest in applying for the channel, if allotted. The proposal could provide Watertown with its first local FM service.

2. Channel 229A can be reallotted to Watertown from Celina, in compliance with the Commission's minimum distance separation requirements with a site restriction.[1] A site restriction of 3.9 kilometers (2.4 miles) northeast of the city is required in order to avoid a short spacing to vacant and applied for Channel 229A at Dickson, Tennessee.

3. In view of the fact that Watertown, Tennessee, could receive its first local FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Celina, Tennessee	229A, 268A	268A
Watertown, Tennessee	—	229A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 26, 1990,** and reply comments on or before **March 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

William O. Barry
429 West Spring Street
Lebanon, TN 37087
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The restricted site coordinates are 36-07-09 and 86-06-02.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-604

In the Matter of

Amendment of Section 73.202(b), RM-7049
Table of Allotments,
FM Broadcast Stations.
(Gordonsville and Orange, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 12, 1989; Released: January 3, 1990

By the Chief, Allocations Branch:

1. Radio Virginia Limited Partnership (petitioner), licensee of Station WVJZ(FM), Channel 255A,[1] Orange, Virginia, has filed a petition for rule making seeking the reallotment of Channel 255A from Orange to Gordonsville, Virginia, as that community's first local service. Petitioner also seeks the modification of its license for Station WVJZ(FM) to specify the change of community of license from Orange to Gordonsville in accordance with Section 1.420(i) of the Commission's Rules. Petitioner filed information in support of its proposal.

2. Petitioner states that the channel change would allow Station WVJZ(FM) to take advantage of the allowable increase of power for a Class A station and provide the area with improved broadcast service. Petitioner further states that it proposes to relocate its transmitter site. In addition, petitioner states that the removal of Channel 255A from Orange would not deprive Orange of its only local service since that community is currently also served by Station WJMA(AM).[2]

3. We believe the proposal warrants consideration. The proposal would not deprive Orange (population 2,631) [3] of its only local broadcast service. Moreover, Gordonsville, a community of 1421 persons, could receive its first local broadcast service. The proposal is mutually exclusive with the present facilities at Orange because the community separation is less than the required 105 kilometers (65 miles) for Class A co-channel allotments.

4. Channel 255A can be reallotted from Orange to Gordonsville in compliance with the Commission's minimum distance separation requirements at the site specified by the petitioner.[4] As requested, we shall propose to modify the license of Station WVJZ(FM) to change the community of license and specify operation on Channel 255A at Gordonsville. In accordance with Sections 1.420(g) and (i) of the Commission's Rules we shall not accept competing expressions of interest in the use of Channel 255A at Gordonsville nor require the petitioner to demonstrate the availability of an additional equivalent class channel at Gordonsville.

5. In view of the fact that Gordonsville, Virginia, could receive its first local FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

City	Channel No. Present	Proposed
Gordonsville, Virginia	—	255A
Orange, Virginia	255A	—

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **February 26, 1990,** and reply comments on or before **March 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Erwin G. Krasnow, Esquire
Verner, Liipfert, Bernhard, McPherson
and Hand, Chartered
901 15th Street, N.W.
Suite 700
Washington, D. C. 20005-2301
(Counsel for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Channel 255A was allotted to Orange effective September 25, 1989. *See Woodstock, Broadway, Buena Vista, Virginia, et al,* 54 FR 33901, August 17, 1989.

[2] Station WJMA(AM) is co-owned by the petitioner.

[3] Population figures taken from the 1980 U.S. Census.

[4] Petitioner's specified site is located 0.6 kilometers (0.4 miles) southeast of Gordonsville at coordinates 38-08-15 and 78-11-01.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-36

In the Matter of

Amendment of Section 73.202(b),	RM-5503
Table of Allotments,	RM-5923
FM Broadcast Stations.	
(Hiawatha, Manhattan and	
Ogden, Kansas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 13, 1989; Released: January 3, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 1517 (1987), issued in response to a petition filed by KNZA, Inc. (KNZA) and an *Order To Show Cause*, 4 FCC Rcd 3795 (1989), directed to Kaw Valley Broadcasting Co. (Kaw Valley). The *Notice* proposed the substitution of FM Channel 268C2 for Channel 280A at Hiawatha, Kansas, and modification of the license for Station KNZA-FM. The *Order To Show Cause* directed Kaw Valley Broadcasting to show cause why its channel should not be changed from 280A to 278A. Kaw Valley Broadcasting Co. and Solomon Valley Broadcasting, Inc., filed comments in response to the *Order To Show Cause*.[1]

2. In response to the *Order*, Kaw Valley states that it does not object to the modification of its license for Station KQLA, Ogden, provided it is reimbursed for the reasonable costs associated with accomplishing the channel change. Kaw Valley does request that the Commission explicitly state which licensee or licensees will be responsible for reimbursing it.

3. Solomon Valley Broadcasting, Inc., licensee of Station KVSV-FM, Beloit, Kansas, filed comments supporting the action proposed in the Order To Show Cause, insofar as it will create a favorable outcome of the Rule Making to upgrade Channel 288A to Channel 288C2 at Beloit.

4. After consideration of the record in this proceeding, we believe it would serve the public interest to allot Channel 268C2 to Manhattan, Kansas, and Channel 280C2 to Hiawatha, Kansas, while substituting Channel 278A for Channel 280A at Ogden, Kansas. Channel 268C2 can be allotted to Manhattan, Kansas, in compliance with the Commission's spacing requirements.[2] We shall modify the license for Station KMKF to specify operation on Channel 268C2 in lieu of Channel 269A in accordance with Section 1.420(g) of the Commission's Rules. We shall also substitute Channel 280C2 for Channel 280A at Hiawatha, Kansas, and modify the license of Station KNZA-FM to specify operation on Channel 280C2 in accordance with Section 1.420(g) of the Commission's Rules. Channel 280C2 can be allotted to Hiawatha at petitioner's specified site in accordance with the spacing requirements provided Channel 280A is deleted at Ogden, Kansas. [3] Channel 280A is licensed to Kaw Valley Broadcasting Co., Station KQLA-FM. Kaw Valley, in response to the Order To Show Cause, has agreed to the substitution of Channel 278A for 280A, provided it is reimbursed for its expenses in changing channels. KNZA has stated its willingness to reimburse Kaw Valley Broadcasting Co. for all reasonable expenses. Because the need to consider Channel 278A as an alternate channel at Ogden only arises as a result of the Channel 280 upgrade at Hiawatha, KNZA will be solely responsible for reimbursement. Channel 278A can be allotted to Ogden, Kansas, in compliance with the Commission's spacing requirements.[4]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 20, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Hiawatha, Kansas	280C2
Manhattan, Kansas	268C2, 284C2
Ogden, Kansas	278A

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of KNZA, Inc. for Station KNZA-FM, Channel 280A, Hiawatha, Kansas, IS MODIFIED TO SPECIFY operation on Channel 280C2, and the license of Manhattan Broadcasting Co., for Station KMKF, Channel 269A, Manhattan, Kansas, IS MODIFIED TO SPECIFY operation on Channel 268C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHERED ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended. the license of Kaw Valley Broadcasting Co., for Station KQLA, Channel 280A, Ogden, Kansas, IS MODIFIED TO SPECIFY operation on Channel 278A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-860220KB except the channel as specified above. Any other changes, except for those specified under Section

73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-860220KB except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] In addition, Valley Broadcasting, Inc. ("Valley"), filed a petition for Leave to file comments and comments. KNZA, Inc. filed a response to Valley's late comments. Valley filed a supplement to its comments. Webster Communications Company filed a petition for Leave to file reply comments and reply comments. Solomon Valley Broadcasting, Inc., filed an informational supplement. Valley filed a petition for leave to supplement comments and supplemental comments. Valley, the licensee of station KOMJ-FM, Atlantic, Iowa, requests that we either decline to allot Channel 280C2 to Hiawatha or site restrict that allotment so as to allow Valley to change its transmitter site to the Crown Point antenna farm in Omaha, Nebraska. Valley requests this change to remedy intermediate frequency interference allegedly caused to its signal in the vicinity of Crown Point by a colocated television Channel 6 station and FM Channel 253 at Crown Point. Recognizing that from this antenna site Valley could not provide city grade coverage to Atlantic, Valley requests either a waiver of the Commission's city grade coverage requirements or that the Commission consider realloting its channel to Omaha "or some other community which will permit colocation," such as Council Bluffs, Iowa. Valley's untimely pleadings were filed well after the comment date in this proceeding. Insofar as they request reallotment of KOMJ-FM's channel from Atlantic to another community, they constitute an untimely counterproposal in this proceeding. Insofar as they request a waiver of city grade coverage requirements, Valley's request should be advanced by the filing of an FCC Form 301 to change transmitter location. In either event, we will not impose the requested site restriction in this proceeding.

[2] The coordinates for Channel 268C2 at Manhattan are 39-16-01 and 96-28-01.

[3] The coordinates for Channel 280C2 at Hiawatha are 39-40-18 and 95-28-54.

[4] The coordinates for Channel 278A at Ogden are 39-09-21 and 96-36-44.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-3

In re Applications of	
COLONIAL COMMUNICATIONS, INC.	File No. BPH-860801MB
BEDFORD CONCEPTS, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-860804ME
DONNA M. MACNEIL	File No. BPH-860804MF
APPLEDORE COMMUNICATIONS, INC.	File No. BPH-860804MI
For Construction Permit for a New FM Station in Bedford, New Hampshire Channel 243A (96.5 MHz)	

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1989; Released: January 4, 1990

By the Review Board: Board Members BLUMENTHAL and ESBENSEN.

1. In an Initial Decision (*I. D.*) in this proceeding, FCC 89D-32, released August 3, 1989, Administrative Law Judge Richard L. Sippel (ALJ) granted the application of Donna M. MacNeil for a new FM broadcast station in Bedford, New Hampshire. The proceeding is now before the Review Board on exceptions. While the ALJ favored MacNeil as the comparatively superior applicant, two of her competitors, Colonial Communications, Inc. (Colonial) and Appledore Communications, Inc. (Appledore), contend that the case should be remanded for the additions of financial and related issues pertaining to MacNeil's application. Because we are unable to resolve these questions on the present record, we shall direct MacNeil to supplement the record as indicated in this opinion.

2. The exceptions of both Colonial and Appledore contend that the ALJ erred fatally in failing to add a financial issue (and an attendant misrepresentation issue) against MacNeil during the course of the hearing. In addition, Appeldore faults the ALJ for refusing to reopen the record to receive into evidence new documentation purportedly showing that Donna MacNeil, jointly with her husband, has recently assumed nearly $1.5 million in additional mortgage debts, which Appledore contends undermines her prior and current claims to financial qualification. The facts giving rise to these exceptions are briefly reviewed.

3. Donna MacNeil, a Bedford businesswoman applying as a sole proprietor, personally certified to her available financial resources in her August 1986 FCC application. Although no financial issue had been designated against her application, the ALJ, in apparent response to a broad discovery request, *sua sponte* ordered MacNeil to produce "a verified financial statement which discloses a true account of her assets on August 4, 1986, on which she relied in making her financial certification to the Commission."[1]

4. In response, MacNeil supplied the record with a letter from her accounting firm and a personal balance sheet depicting her August 1986 financial position as follows [2]:

ASSETS

Cash	$ 15,000.00
Real Estate, Bedford Home FMV	275,000.00
Furniture, Jewelry	50,000.00
Auto, Jaguar	10,000.00
Net Book Value of MacNeil's Store after external debt	119,000.00
TOTAL ASSETS	**$469,000.00**

LIABILITIES

Accounts Payable	$ 1,000.00
Mortgage, Bedford Home	41,000.00
TOTAL LIABILITIES	**42,000.00**
NET WORTH	**427,000.00**
TOTAL LIABILITIES AND NET WORTH	**$469,000.00**

In addition, MacNeil was represented as having in excess of $150 thousand in available certificates of deposit, as of August 1986. [3] And, finally, MacNeil supplied several letters from The Bedford Bank indicating that, at the time of the filing of her application, she had available a line of credit at that bank in excess of $275 thousand which, based on the *unencumbered value of her personal residence and her business inventory*, could have been made available to her in 1986 for purposes of financing her application. [4] Upon those uncontested representations, the ALJ properly refused to designate a financial issue against MacNeil.

5. However, the exceptions assert that MacNeil subsequently failed to report that, several months after supplying her balance sheet and the letters from The Bedford Bank, MacNeil further encumbered her residence in the fall of 1988 with much larger mortgage transactions that jointly indebted MacNeil and her husband for a total of $950 thousand. [5] MacNeil does not deny these subsequent encumbrances of her residence, upon which the $275 thousand line of credit from The Bedford Bank seemed plainly to rely to some significant extent. [6]

quent encumbrances of her residence, upon which the $275 thousand line of credit from The Bedford Bank seemed plainly to rely to some significant extent. [6]

6. Having reviewed the existing record, and amplified the exceptions with oral argument, we find that it would be helpful to have MacNeil supply an updated report on her financial status. We believe, for example, that to the degree that Donna MacNeil's aforenoted $275 thousand line of credit at The Bedford Bank rested upon a net equity value of more than $200 thousand in her personal residence, her inclusion of that property as partial collateral for $950 thousand in later mortgages from another bank (Derry Bank & Trust Company) could have affected significantly her Bedford Bank line of credit. Further, in view of the recent addition of another $785 thousand in mortgage liability she also shares with her husband (*see supra* note 5), it will be necessary to review the current joint balance sheet of Donna MacNeil and her husband, particularly identifying those assets on which she has lately relied to finance her station. [7] Should MacNeil be relying entirely on personal liquid assets to fund her broadcast application, she should describe and corroborate, in verified form, those liquid assets. Should she be relying instead on a credit or loan agreement with a financial institution, she should provide appropriate documentation in corroboraton thereof.

7. ACCORDINGLY, IT IS ORDERED, That Donna M. MacNeil SHALL FILE the documents called for in paragraph 6 herein within twenty (20) days of the release date of this Order, and

8. IT IS FURTHER ORDERED, That the competing applicants herein MAY FILE responsive comments within ten (10) days of the date of the filing of the respective documents.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] *See* Colonial Exceptions at 5-6 (quoting ALJ). According to Colonial (*see id.*, at 6 n.3), the ALJ further directed:

> MacNeil's financial statement may be as detailed as she believes it is in her interest to make, so long as it is sufficient to show a reasonable assurance. For example, she need not disclose non-liquid assets which would not qualify or which were not needed for her certification. Also, reasonable surrogate materials which are separately verified may be used rather than preparing anew a financial statement for this purpose (*e. g.* schedules to income tax returns or applications to banks for credit or loans.)

[2] *See id.*, at 6-7.

[3] *See id.*, at 6 n.4.

[4] A sworn declaration from The Bedford Bank official "clarf[ied] that her line of credit as of August 1, 1986, was $286,000." *Id.*, at 9.

[5] Colonial and Appledore also report a mortgage indebtedness of $785 thousand on non-residential real estate owned jointly by MacNeil and her husband, a mortgage on which Donna MacNeil is a co-signatory. *See id.*, at 10.

[6] For example, a July 29, 1988 letter to MacNeil from The Bedford Bank states:

> Dear Mrs. MacNeil:
>
> On August 1, 1986 and again on February 22, 1988, Frederick Savage, Vice-President of The Bedford Bank, wrote you referring to an available Line of Credit with the Bank. Both letters were referrng to the same Line of Credit and therefore carried the same terms and conditions as outlined in the February 22, 1988 correspondence, namely, that the Line of Credit carries a variable rate of interest at The Bedford Bank base plus 1.5% on the disbursed principal balance and calls for monthly interest payments on the disbursed portion. The Line of Credit is in excess of $275,000.00.
>
> We are also aware that in August 1986 you owned a home at 24 Wendover Way, Beford, New Hampshire, shown in your name only. The mortgage balance in August 1986 was approximately $42,000.00 with an estimated market value of $250,000.00.
>
> As you are aware, unencumbered inventory has been a source of loan funds to your businesses in the area through this Bank. We are aware that you owned unencumbered inventory in July 1986 of approximately $100,000.00. Based on our long business relationship with you and the value of your home and inventory, in addition to your Line of Credit this Bank, if requested to do so, could have conceivably made funds of $240,000.00 available to you in July, 1986.
>
> At present the Bedford Bank has approximately $75,000.00 on deposit through Certificates of Deposit in your name. We also show another $75,000.00 in your husband's name. It is my understanding that our affiliate, Merchants National Bank, also holds certificates in the area of $100,000.00 in your name and $100,000.00 in joint name with your husband.
>
> Should you have any questions, please feel free to contact me.
>
> Very truly yours,
>
> Leo E. Bergeron
>
> Assistant Vice-President

[7] Should MacNeil be relying on non-liquid assets for financing her station, credible appraisals should also be supplied. *See Opal Chadwell*, 4 FCC Rcd 1215, 1216-1217 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-426

In re Applications of

SHAWN PHALEN	File No. BPH-851231MO
Patricia Josephine Jacobsen, d/b/a PEACOCK BROADCASTING, LTD.	File No. BPH-851231MP
ELLWOOD BEACH BROADCASTING, LTD.	File No. BPH-851231MS
SPIRIT BROADCASTING	File No. BPH-860102MZ
JAMES EVANS	File No. BPH-851231MR
CLAUDIA BRATTON	File No. BPH-860102MX

For Construction Permit for New FM Broadcast Station at Montecito, California

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1989; Released: January 4, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL.

1. The Board has before it the *Initial Decision*, 4 FCC Rcd 5714 (1989) (*I. D.*), of Administrative Law Judge Walter C. Miller granting the application of Claudia Bratton (Bratton) for a Construction Permit to establish a new FM broadcast station at Montecito, California. Exceptions were filed by four competing applicants: Shawn Phalen (Phalen), Ellwood Beach Broadcasting, Ltd., Spirit Broadcasting, and James Evans. [1] After reviewing the *I. D.* in the light of the exceptions and replies filed by the various applicants, the oral argument held December 15, 1989, and our own independent examination of the record, we find that it is necessary to remand the proceeding on a basic financial qualifications issue against Bratton.

2. The exceptions before us urge that the ALJ erred in failing to add a financial issue against Bratton, based in the main on evidence proffered in support of a Phalen "Petition to Enlarge Issues," filed on May 5, 1988. Appended to that motion (Attachment E) was a letter of April 22, 1988 to Phalen's counsel from the Assistant Vice President of the Bank of Montecito, Phil Morreale, which cast substantial doubt on the validity of Bratton's claim to "reasonable assurance" of a loan (of an unknown amount) from that bank to finance her proposed facility.

3. More specifically, that bank letter, in pertinent part, advised:

> Per your request, I have researched the letter dated December 31, 1985 between The Bank of Montecito and Ms. Claudia Bratton.
>
> At the time the letter was written it does not appear that the Bank obtained financial data on Ms. Bratton. As can be seen in the last paragraph of the letter, loan approval was contingent upon Ms. Bratton's obtaining the necessary authorization to construct and operate the proposed broadcast station, final review of of her financial position and business plans, and approval by the Bank's Loan Committee.
>
> In order to assess the borrower's abilities to qualify for the loan, the Bank would require the borrower to submit, in addition to the above referenced business plan, a copy of her personal financial statement and tax returns from the prior two to three years. The Bank would also obtain a credit report on Ms. Bratton.
>
> Approval of the loan would be based on the borrower's ability to repay the loan, the structure of the business, prior credit experience and personal ability to service the debt should the business be unable to.
>
> Without the above information, the Bank would not be able to commit to the financing of the radio station. This is outlined in paragraph four of the letter dated December 31, 1985.

4. It appears effectively undisputed that neither at the time she originally discussed a potential loan with the Bank of Montecito nor at any relevant time subsequent has Bratton supplied the underlying data upon which the bank might more seriously consider any prospective loan request. Relying, in part, upon *Multi - State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978), Bratton nonetheless replies that she was a depositor at that bank, that she has a track record in broadcast sales, that she personally discussed her business plan with bank officials, and that Phalen did not meet its burden of raising a significant question of fact as to the "reasonable assurance" of Bratton's alleged bank financing. We disagree.

5. As in several other recent cases, the Board is again confronted with an applicant purporting to rely upon a "bank letter," but where upon further perusal it appears that its letter may be no more than a good will "accommodation" letter embodying no substantive agreement or tentative commitment to provide the necessary loan amount to the FCC applicant. *See, e. g., Marlin Broadcasting of Central Florida*, 4 FCC Rcd 7945, 7946-47 (Rev. Bd. 1989); *JAM Communications*, 4 FCC Rcd 3754, 3757 (Rev. Bd. 1989); *Dutchess Communications Corp.*, 101 FCC 2d 243, 244-249 (Rev. Bd. 1985). In those cases, the Board has followed the established precedent of assuring that the proposed borrower/applicant "is willing, *and able*, to meet all of the lender's requirements with respect to collateral, guarantees, and capital investment by the lendee." *Marlin Broadcasting*, at 7947. *A fortiori*, where it has appeared that an applicant has supplied no data (or insufficient data) to a bank to permit it to make even a preliminary judgment on the acceptability of any potential loan, we

naturally have questioned the existence of any meaningful loan commitment upon which to have based a "reasonable assurance" claim as to partial (or total) bank financing. *E. g., Dutchess Communications, supra.*

6. It is well-settled that the Commission's "reasonable assurance" standard does not demand an unequivocal loan guarantee in advance from a financial institution, before an applicant can claim to be financially qualified for Commission purposes. *Las Vegas Valley Broadcasting Co. v. FCC*, 589 F.2d 594, 599-601 (D.C. Cir. 1978). But, it is equally established that the Commission may look behind any purported loan arrangement to adduce whether any fundamental loan understanding actually exists or whether, in fact, there exists no more than a prospective lender's mere invitation to solicit an ordinary loan application at some later date.

7. A good example of the Board's review of the efficacy, *vel non*, of a purported bank loan arrangement is provided in *Jay Sadow*, 39 FCC 2d 808 (Rev. Bd. 1973). There, in response to a competing applicant's assertion that a particular bank letter was insufficient to provide "reasonable assurance" of a $220,000 loan, the Board noted that the bank's letter was supported by a repayment guaranty from the applicant's corporate parent, as well as a declaration from the bank's legal counsel that "the $220,000 loan [commitment] is binding upon the bank . . . ." *Id.*, at 809. It is clear also in *Sadow* that the subject bank had most thoroughly reviewed the applicant's creditworthiness and negotiated the terms and conditions of the loan to its satisfaction and that of the borrower. *See id.*

8. By contrast, it here appears that Bratton never supplied, so the bank never reviewed [2]:

> (i) a business plan for her proposed station;
>
> (ii) written cost estimates of the station;
>
> (iii) a personal financial statement; or
>
> (iv) information of any sort concerning her own personal financial condition, assets, net worth or the like.

It is also asserted [3]:

> Bratton further testified that the Bank "didn't give me any specifics as to what I had to meet" in order to qualify for a loan and, when asked, "[a]t this point in time, do you have any understanding of what you will have to do to satisfy the bank's loan commitment?", she responded: "I have some." When asked the basis of that understanding, she stated: "I don't know."

9. In light of these circumstances, coupled to the Bank of Montecito's April 22, 1988 letter indicating that it would yet require all of the basic data on Bratton's business plan, her prior credit experience, her "personal ability to service the debt should the business be unable to" (without which information "the Bank would not be able to commit to the financing of the radio station"), we find that a significant question arises as to Bratton's basic financial qualifications. *See Chapman Radio & Television Co.*, 70 FCC 2d 2063, 2072 (1979)(no "reasonable assurance" of bank loan commitment where collateral neither specified nor demonstrated). Our view in this regard is reinforced by *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987)(emphasis added), where notwithstanding a purported "reasonable assurance" bank letter, a financial issue was designated for hearing against certain applicants because "it is clear that the applicants' *individual qualifications* were not considered by those banks" and that, therefore, "[i]nquiry is needed to determine whether the bank letters were more than accommodations" for the license applicants. [4] No lesser inquiry is dictated on the facts before us. [5]

10. ACCORDINGLY, IT IS ORDERED, That the "Motion to Dismiss" filed September 1, 1989 by Ellwood Beach Broadcasting, Ltd. IS GRANTED in part and DENIED in part, the "Motion to Dismiss With Prejudice" filed September 1, 1989 by Claudia Brattion IS GRANTED, the "Motion to Strike, Motion to Dismiss With Prejudice" filed September 1, 1989 by Claudia Bratton IS DENIED, and the application of Peacock Broadcasting, Ltd. (File No. BPH-851231MP) IS DISMISSED;

11. IT IS FURTHER ORDERED, That the unopposed Petitions for Leave to Amend filed August 21, 1989, September 26, 1989, and December 12, 1989 by Shawn Phalen, Ellwood Beach Broadcasting, Ltd., and Spirit Broadcasting, respectively, ARE GRANTED, and the amendments ARE ACCEPTED; and

12. IT IS FURTHER ORDERED, That this processing IS REMANDED to the Presiding Officer for the adduction of additional evidence and the preparation of a Supplemental Initial Decision on an issue to determine whether Claudia Bratton is financially qualified to be a Commission license.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Review Board

FOOTNOTES

[1] We will dismiss the application of Peacock Broadcasting, Ltd. for failure to prosecute, pursuant to 47 CFR § 1.276(f), because it did not file exceptions to the ALJ's denial of its application.

[2] Phalen Exceptions at 40.

[3] *Id.*, at 41 (quoting Bratton deposition).

[4] Not to the contrary is *Multi - State Communications, supra*, where the court reprised a bank letter affirming that "[t]his bank is personally and favorably acquainted with several of the stockholders listed in your application to the Federal Communications Commission" and that:

> As a condition of our intent to finance Multi-State Communications, Inc., we are depending on the continued participation in your venture of substantially all of the stockholders named in your application or substitute stockholders which are acceptable to the Chase Manhattan Bank.

590 F.2d at 1118. (It is also noteworthy, we believe, that the "personally and favorably" known borrowers in *Multi - State* sought merely a $4 million loan should they acquire through comparative hearing VHF Television Channel 9, New York

City, a going and immensely valuable business concern, whereas the loan here (of some unspecified amount) would be for a new FM station in Montecito, a speculative broadcast venture of considerable economic risk.)

[5] Nor are we persuaded by Bratton's production of a letter of May 19, 1988, from a different Bank of Montecito official (appended as Exh. A to Bratton's May 24, 1988 Opposition To Issue Enlargement). While that subsequent letter commences by "reconfirm[ing] The Bank of Montecito's 'reasonable assurance' to make a loan to you," it concludes as follows:

> We are agreed that "reasonable assurance" does not infer a commitment on the part of this Bank at this time to make the loan. Our decision whether to commit to lend you money will be made upon your receiving the construction permit, and will be based upon a review of your complete financial package.

As exemplified in *Christina Communications*, the term "reasonable assurance" is not talismanic; it must be undergirded by substance beyond formula semantics.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New England Telephone and
Telegraph Company and
New York Telephone Company

Plan to Provide Comparably
Efficient Interconnection to
Providers of Enhanced Protocol
Processing Services

MEMORANDUM OPINION AND ORDER

Adopted: December 26, 1989; Released: January 4, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On May 17, 1989, pursuant to the requirements the Commission adopted in the *Computer III* proceeding,[1] New England Telephone and Telegraph Company and New York Telephone Company (NYNEX) filed a plan to provide Comparably Efficient Interconnection (CEI) for enhanced protocol processing services (Plan), stating that it plans to provide protocol processing without structural separation. Telenet Communications Corporation (Telenet) filed comments on the Plan, and NYNEX filed a reply. In this Order, we approve the Plan, subject to certain conditions.

II. SERVICE DESCRIPTION

2. NYNEX requests authority to provide a variety of enhanced protocol processing services on an unseparated basis in connection with four different classes of underlying basic services: (1) Exchange Telephone Service; (2) Private Line Service (PLS); (3) INFOPATH Packet Switching Service; and (4) Central Office Local Area Network (CO-LAN) Service, including CENTREX-LAN.[2] In addition to the protocols listed in its Plan, [3] NYNEX seeks permission to provide protocol processing for new protocols that become available in the future.[4] NYNEX also seeks permission to engage in joint marketing of INFOPATH service and enhanced protocol processing (asynchronous to X.25 and X.75[5] as well as the protocols listed in the plan).[6]

3. NYNEX states that its Exchange Telephone Services can be used to gain access to its enhanced protocol processing offering.[7] NYNEX also states that PLS, used in conjunction with protocol processing, will provide dedicated analog or digital communications at various bandwidths and transmission speeds, thus allowing customers to connect disparate terminal equipment within a single private network.[8] NYNEX adds that INFOPATH Packet Switching Service will provide basic packet switched data transmission capabilities and access to enhanced protocol processing, typically for customers engaged in interactive data communication between terminals and computers.

4. NYNEX states that "CO-LAN is a switched data communications network service which provides simultaneous voice and synchronous or asynchronous data transmission over . . . exchange . . . lines . . . ."[9] NYNEX adds that the CO-LAN line is the basic service component that will be used to access the enhanced protocol processing services,[10] using either asynchronous or synchronous communications, depending on the customer's needs. NYNEX states that its protocol processing services offered with CO-LAN lines may be provided outside the CO-LAN data switch or integrated within the switch. NYNEX states that it will use CO-LAN lines, including DVMs to connect the CO-LAN switch to the protocol processor when the protocol processor is located outside the CO-LAN switch.[11]

III. CEI REQUIREMENTS

A. Minimization of Transport Costs

5. The Plan states that NYNEX will charge its enhanced protocol processing service operation the same rates that are paid by non-collocated enhanced service providers (ESPs) for access connections.[12] In particular, NYNEX states that when its enhanced protocol processing equipment is located in the central office, NYNEX will charge its enhanced service operations for tariffed services as if the operations were located within the central office district but outside the central office building. NYNEX states that although the majority of basic network services used in providing enhanced protocol processing services are tariffed at averaged, non-distance sensitive rates, there are a few services which have distance-sensitive charges for intraoffice facilities.[13] NYNEX states that when its enhanced service operations subscribe to services which have distance sensitive-charges, it will charge its own enhanced service operation as if it were located two miles from the central office whenever the distance from the central office to the boundary is two miles or more.[14] However, NYNEX states that central office districts in densely populated business areas may cover very small geographic areas, sometimes only a few city blocks.[15] NYNEX argues that this makes "it impossible to apply the two mile rule."[16] Therefore, in these circumstances, NYNEX proposes to charge its enhanced service operation as though it were located at one-half the distance from the central office to the furthest portion of the central office district boundary, rather than charge its operations the two-mile price.[17] NYNEX argues that this pricing method is consistent with the Commission's conclusion in the *BOC ONA Order* that it would not be desirable to require the BOC to charge itself based on the furthermost distance from the central office.[18]

6. Telenet opposes NYNEX's "departure from the 'two-mile rule' concerning parity pricing for distance-sensitive intra-office loops . . . ."[19] Telenet agrees with NYNEX that it "makes no sense" to require the BOC to charge itself a two-mile rate when the greatest distance to the district boundary is less than two miles.[20] Telenet, however, proposes another solution--allowing NYNEX to charge its enhanced service operations based on the actual distance to the furthest boundary.[21] Telenet argues that its solution is "simpler" than that proposed by NYNEX and

will ensure that the BOC enhanced service operations are not always charged a rate that exceeds the rate paid by other ESPs.[22] In addition, Telenet believes that this solution "would perpetuate the modest incentive for the BOC to permit collocation",[23] which Telenet views as inherent in the current rule. Although Telenet recognizes that there are very few services offered under distance-sensitive tariffs at present, it is concerned that NYNEX could amend its tariffs in the future to establish distance-sensitive rates for services currently offered at flat rates.[24]

7. In its reply, NYNEX argues that under Telenet's proposal NYNEX's enhanced service operation would "typically" pay higher rates than other ESPs.[25] In support of this contention, NYNEX observes that Telenet's proposal would ensure that the BOC enhanced service operations pay rates based on the maximum distance to the central office district boundary while other ESPs would be able to select locations within the district boundaries to ensure lower rates than NYNEX's enhanced service operation.[26] As a result, NYNEX argues that it would be at an "unreasonable competitive disadvantage" if it must pay the two-mile rate or charges reflecting the full distance to the farthest point of the central office district boundary in these cases.[27]

8. The *BOC ONA Order* states that the requirement for minimization of transport costs may be satisfied through the use of price parity, and describes ways that a BOC can implement price parity for collocated enhanced services.[28] That Order established the two-mile rule to ensure that collocated BOC affiliates would not have an unfair advantage over other ESPs located close to the switch.[29] We believe that NYNEX's plan represents a reasonable application of existing pricing principles in these circumstances. The two-mile rule is designed to ensure that collocated BOC enhanced service operations do not have an unfair price advantage over other ESPs located close to the switch. It is not intended to force the integrated BOC operations to pay the maximum distance-sensitive rate in small, densely populated central office districts in business areas, as Telenet proposes. Accordingly, we conditionally approve this aspect of the Plan, pending Commission review of these issues in the context of NYNEX's Amendment to its ONA Plan.[30]

B. Other CEI Requirements

9. NYNEX also describes how it will comply with the other CEI parameters described in the *Phase I Order*.[31] NYNEX states that all the basic services and functions that it will use to provide enhanced protocol processing services have been unbundled, and are currently available under tariff.[32] NYNEX adds that it will not use any network functions for its enhanced services that are not "available to all ESPs under the same terms and conditions, and at the same degree of unbundling."[33] NYNEX states that its enhanced service operations will purchase "underlying basic services at the same unbundled tariff rates, terms and conditions available to other ESPs."[34] NYNEX adds that all basic services used to access the enhanced protocol processing functions are tariffed and available to all ESPs and end users.[35] In addition, NYNEX states that all underlying basic services will be available to all ESPs at the same time and under the same terms and conditions.[36] Furthermore, NYNEX states that all service features available to its enhanced protocol processing service will be available to all end users on the same terms and conditions.[37]

10. NYNEX states that all basic network services listed in its Plan will use standard published interfaces.[38] NYNEX adds that interconnection to its enhanced protocol processing service will be through the same standard network interfaces which are currently available to other ESPs under tariff.[39] NYNEX also states that its network is designed to ensure that all customers receive "services that are equivalent in technical quality."[40] NYNEX adds that it will use the installation, maintenance and repair procedures that the Commission approved in the NYNEX ONA Plan.[41]

11. NYNEX also describes how it will comply with the other nonstructural safeguards described in the *Phase I Order*. NYNEX states that it will use the installation and maintenance nondiscrimination reporting procedures described in its original ONA plan with modifications to reflect the amended ONA plans NYNEX filed on May 19, 1989.[42] NYNEX also states that it will satisfy the Customer Proprietary Network Information (CPNI) requirements in the same manner described in a previously approved CEI plan.[43] NYNEX adds that its cost allocation manual describing the procedures for identifying nonregulated revenues, investments, and expenses has been approved by the Commission.[44] NYNEX further states that it will comply with the Commission's network information disclosure requirements if any new network interfaces arise, although its Plan does not propose any changes to existing network interfaces.[45]

12. We approve NYNEX's Plan to offer CEI to providers of enhanced protocol processing services described herein, finding that NYNEX has shown that it will comply with the CEI parameters, other non-structural safeguards, and the CEI pricing requirements.[46]

IV. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, NYNEX's Plan to provide comparably efficient interconnection to providers of enhanced protocol processing services described herein, IS APPROVED, subject to conditions.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The Commission's decision in *Computer III* requires a Bell Operating Company (BOC) that wishes to offer an enhanced service on an unseparated basis prior to implementation of a comprehensive Open Network Architecture (ONA) Plan to submit and obtain approval of a CEI plan for the specific service, or class of services, it proposes to offer. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations, *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *ap-*

peals pending sub nom. California v. FCC, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1988) and *sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration*), *further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration*), *appeal pending sub nom.* California v. FCC, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988).

[2] Plan at 2.

[3] *Id.* at Attachment A.

[4] NYNEX states that the "processing of such additional protocols will use the underlying basic services specified" in its Plan, and that its enhanced services operations "will use such basic services in the same manner as specified" in its Plan. *Id.* at 3.

[5] NYNEX notes that the Plan does not apply to asynchronous to X.25 and asynchronous to X.75 protocol conversion to the extent that NYNEX is already permitted to provide those services in connection with its INFOPATH service. *Id.* at 5, n.5.

[6] NYNEX states that it will provide the additional protocol processing services employing INFOPATH in the same manner that protocol conversion is currently provided with INFOPATH. *Id.* at 5.

[7] NYNEX states that the Exchange Telephone Services that can be used for this purpose include Business Access Lines, Residence Access Lines, CENTREX Lines, and Foreign Exchange Lines. *Id.* at 4.

[8] NYNEX's basic PLS offerings which can be used to access its enhanced protocol processing services are Analog Private Line, Quickway and Digipath (Digital Data Service (DDS)), Superpath 1.544 megabit/second services, and Superpath Optical 1.544 megabit/second services. *Id.* at 4-5.

[9] *Id.* at 6. CO-LAN service requires a customer-provided data, voice multiplexer (DVM) located at the customer's premises and similar equipment in the central office. NYNEX notes that CO-LAN service is offered under tafiff in Massachusetts and that a tariff for this service is pending in New York. CENTREX-LAN service is currently tariffed in both states. *Id.*

[10] NYNEX states that a CO-LAN line consists of a "derived data channel and a data switch termination." *Id.*

[11] *Id.* When the protocol processor is integrated into the CO-LAN switch, NYNEX will impute CO-LAN line charges as if the protocol processor were located outside the switch. *Id.*

[12] *Id.* at 11.

[13] NYNEX cites its Superpath 1.544 megabit/second service as an example of a service with distance-sensitive charges. *Id.* at 12.

[14] The Commission established the "two-mile" requirement in the BOC ONA proceeding. *See* Filing and Review of Open Network Architecture Plans, CC Docket 88-2, Phase 1, *Memorandum Opinion and Order*, (BOC ONA *Order*) 4 FCC Rcd 1 (1989), *reconsideration pending, appeal pending sub nom.*, Pacific Bell and Nevada Bell v. FCC, No. 89-1194 (D.C. Cir.) (pet. for rev. filed Mar. 20, 1989).

[15] Plan at 12.

[16] *Id.*

[17] *Id.* NYNEX notes that when the *BOC ONA Order* was released, NYNEX "foresaw no circumstance in which [it] would utilize [its] few distance sensitively priced intra-office loops in the provision of an enhanced service." However, NYNEX states that it recently identified a market for the provision of enhanced protocol processing using such services. *Id.* at 12-13, n.14.

[18] *Id.*

[19] Telenet at 2.

[20] *Id.* at 4.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Id at 5.

[25] NYNEX Reply at 4.

[26] *Id.* at 5.

[27] *Id.* at 6.

[28] *BOC ONA Order*, 4 FCC Rcd at 86-89, para. 166-172.

[29] *Id.* at 86-87, para. 168.

[30] NYNEX also proposes this means of satisfying the price parity requirements in its ONA Plan Amendments. A final determination concerning this proposal will be made in the context of that proceeding.

[31] *Phase I Order*, 104 FCC 2d at 1039-1057, paras. 154-193.

[32] Plan at 8.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 11.

[36] *Id.* at 10.

[37] *Id.*

[38] *Id* at 7.

[39] *Id.* at 8.

[40] *Id.* at 9.

[41] *Id.* at 9-10.

[42] *Id.* at 15-16.

[43] *Id.* at 16. *See* New York Telephone and New England Telephone and Telegraph Company CEI Plan for the Provision of Voice Messaging Services, 4 FCC Rcd 554, at 557, para. 39 (1989).

[44] Plan at 17.

[45] *Id.*

[46] Of course, if and when NYNEX's ONA Plan ultimately is approved, NYNEX must implement any changes for its protocol processing services as well as its other enhanced services.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-90-002

Application for authority to lease and operate facilities for direct service between the U.S. and Mexico.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 22, 1989; Released: January 4, 1990

By the Chief, International Facilities Division:

1. The above-captioned application filed on October 4, 1989 by MCI Telecommunications Corp. (MCI) requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate facilities for direct service between the U.S. and Mexico. The application was placed on public notice on October 11, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Mexico by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-002 IS GRANTED, and MCI is authorized to:

a. lease from AT&T and operate 400 voice-grade circuits connected at various crossing points along the U.S. - Mexico border[1]; and

b. use these facilities to provide MCI's regularly authorized services between the U.S. and Mexico and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in Mexico, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1988).

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] **BORDER CROSSING POINTS**

AT UNITED STATES	AT MEXICO	CKT QUANTITY STARTUP
SAN DIEGO	TIJUANA	100
EL PASO	JUAREZ	100
MCALLEN	REYNOSA	50
LAREDO	NUEVO	100
NOGALES	NOGALES	50

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. — File No. I-T-D-90-003

Application for Authority to Deactivate and Retire the California-Hawaii No. 2 cable and to Modify the Cable Landing License Accordingly.

ORDER AND AUTHORIZATION

Adopted: December 21, 1989; Released: January 4, 1990

By the Chief, International Facilities Division:

1. The above-capitoned application filed on October 20, 1989, by American Telephone and Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to deactivate and retire the California-Hawaii No. 2 cable (HAW-2) and to modify the cable landing license accordingly. The application was placed on public notice on October 25, 1989. No comments were received.

2. The HAW-2 cable connects the U.S. mainland and Hawaii with landing points at San Luis Obispo, California and Makaha, Hawaii. Authority to construct and operate the cable was granted by the Commission in May, 1963.[1] The Cable Landing License was issued on the same day.[2] AT&T states that the ready-for-service date for the cable was July 15, 1964 and the cable has therefore exceeded its planned 25-year life. The present capacity is 143 voice-grade circuits and all are wholly-owned by AT&T. Upon deactivation of the cable, all service will be transferred to other transpacific facilities between the U.S. mainland and Hawaii. There will be no discontinuation of service.

3. Upon review of the foregoing application, we find that the HAW-2 cable has reached the end of its useful service life and that substitute transpacific facilities between the U.S. Mainland and Hawaii are available, offering a better quality of service. Under these circumstances, we conclude that the permanent discontinuance of operation of the HAW-2 cable system and the transfer of service to more modern facilities can be accomplished with no discontinuance, reduction or impairment of any service to any community or any part of a community now served by the HAW-2 cable.

4. Accordingly, IT IS ORDERED that application File No. I-T-D-90-003 IS GRANTED, and AT&T is authorized to permanently retire and discontinue operation of the HAW-2 cable. IT IS HEREBY CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the discontinuance of service via the HAW-2 cable.

5. The Cable Landing License, File No. S-C-L-29, is hereby MODIFIED to allow permanent discontinuance of the HAW-2 cable.

6. Within 60 days of the release of this order, AT&T shall notify the Commission of the accounting treatment it intends to use in retiring the HAW-2 cable.

7. Upon discontinuance of use and operation of the HAW-2 cable, AT&T shall notify the Commission thereof and submit to the Commission for cancellation any submarine cable landing license it possesses covering the HAW-2 cable.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] American Telephone & Telegraph Co., Mimeo No. FCC 63-386, File No. P-C-5332, Released May 1, 1963.

[2] American Telephone & Telegraph Co., Mimeo No. FCC 63-385, File No. S-C-L-29, Released May 1, 1963.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WORLD COMMUNICATIONS, INC. File No. I-T-C-90-013

Application for authorization under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the PTAT-1 Cable System for the provision of authorized common carrier service between the United States and the United kingdom, and beyond.

ORDER AND AUTHORIZATION

Adopted: December 21, 1989; Released: January 4, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 25, 1989 by World Communications, Inc. (WorldCom), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire on an indefeasible right of user (IRU) basis and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S. and the United Kingdom and beyond. The application was placed on public notice on November 1, 1989. No comments were received.

2. WorldCom is a dominant international carrier currently providing international services to the points reached via the PTAT-1 cable system. WorldCom is currently authorized to acquire and operate a one-half interest in two DS-2 (6.312 Mbps) circuits and two E-1 (2.048 Mbps) circuits in the PTAT-1 cable system for service to the United Kingdom, the Republic of Ireland, Bermuda and points beyond.[1] It now proposes to acquire and operate an additional one-half interest in fourteen E-1 circuits in the PTAT-1 cable system for service between the U.S. and the United Kingdom. WorldCom states that PTAT-1 is the best currently available source for its transatlantic, fiber optic, diverse-routing capacity requirements. WorldCom will pay the owners of the cable the sum of not more than $720,000 for a one-half interest in each E-1 circuit to the United Kingdom. These facilities will be used to supplement WorldCom's existing facilities and not to divert any portion of its traffic from the existing common carrier facilities.

3. The Commission stated in its *Private Submarine Cable Decision* [2] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act. [3] In this context, we find that WorldCom's application contains all of the information necessary under Section 63.01 of the Commission's Rules.[4] Furthermore, we find that WorldCom's application does not raise any economic impact issues.[5]

4. Upon consideration of the application, we find that authorization of the facilities requested would serve the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-90-013 IS GRANTED, and WorldCom is authorized to:

a. acquire on an IRU basis, a one-half interest in fourteen E-1 (2.048 Mbps) circuits in the PTAT-1 cable;

b. acquire and operate necessary domestic connecting facilities; and

c. utilize said facilities to provide WorldCom's regularly authorized services between the U.S., and the United Kingdom, and beyond.[6]

6. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to PSI herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* CICI, Inc *et al* 4 FCC Rcd 6622 (1989).

[2] Private Submarine Cable Decision, 100 FCC 2d 1033 (1985).

[3] This requirement was restated in the *International Competitive Carrier* decision, where the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. International Competitive Carrier Policies, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. §63.01.

[4] The Commission places no special burden on any carrier making an application for private cable capacity. *See* Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989).

[5] The Commission stated that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate

that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

[6] WorldCom states that Mercury Communications, Ltd., a British correspondent of WorldCom, has agreed to provide matching PTAT-1 capacity, together with connecting facilities in the United Kingdom.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ST. THOMAS & SAN JUAN TELEPHONE COMPANY, INC. — File No. I-T-C-89-097-1

Application to add additional carriers to its international resale authority. — File No. I-T-C-89-097-1-A

ORDER AND AUTHORIZATION

Adopted: December 26, 1989; Released: January 4, 1990

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on August 22, 1989 and September 25, 1989 by St. Thomas & San Juan Telephone Company, Inc. (STSJ), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to add additional carriers to STSJ's international resale authority released July 11, 1989.[1] The applications were placed on public notice on August 30, and October 4, 1989. No comments were received. Upon consideration of the applications, we find that their grant will serve the public convenience and necessity.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-89-097-1 and I-T-C-89-097-1-A ARE GRANTED, and STSJ is authorized to provide international switched voice services by the resale of the international switched voice services set forth in MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. No. 1, Telefonica Larga Distancia's Tariff F.C.C. No. 1 and Rochester Telephone Corporation's, Tariff F.C.C. No. 2 between the U.S. and the points listed in those tariffs.

3. All other terms and conditions of the Commission's aforementioned order released July 11, 1989 remain the same.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] St. Thomas and San Juan Telephone Company, Inc., File No. I-T-C-89-097, 4 FCC Rcd 5469 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT INTERNATIONAL, INCORPORATED — File No. I-T-C-89-168

Application for authority to acquire and operate facilities for direct service between the U.S. and Australia.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 26, 1989; Released: January 4, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on September 26, 1989 by TRT International, Inc. (TRTI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate satellite, cable and connecting facilities for direct service between the U.S. and Australia. The application was placed on public notice on October 4, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Australia by TRTI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-168 IS GRANTED, and TRTI is authorized to:

a. lease from Comsat and operate 36 voice-grade satellite circuits between the Jamesburg, California earth station and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in Australia furnished by TRTI's correspondent in Australia;

b. lease from AT&T and operate 36 voice-grade circuits in the Jamesburg, California earth station;

c. lease and operate two T-1 terrestrial circuits between the Jamesburg, California earth station and TRTI's New York operating office;

d. lease and operate one voice-grade domestic satellite circuit between New York and the Anzcan cable head at Keawaula, Hawaii including connecting facilities;

e. utilize on a cost flow-through basis four voice-grade half-circuits in the HAW-4 cable, and in the tie cable between Makaha and Anzcan cable head at Keawaula, which have been previously authorized to and owned by TRT's affiliate, FTCC;

f. utilize on a cost flow-through basis five voice-grade half circuits in the Anzcan cable[1] between Keawaula, Hawaii and Paddington, Australia, which have been previously authorized to and owned by TRT's affiliate, FTCC; and

g. use said facilities to provide TRTI's regularly authorized services between the U.S. and Australia and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TRTI and its correspondent in Australia, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. The Commission's temporary authority, granted September 29, 1989, is hereby terminated.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] The fifth cable circuit routed via Anzcan will be extended from New York to Hawaii via domestic satellite facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ST. THOMAS & SAN JUAN TELEPHONE COMPANY, INC. File No. I-T-C-89-169

Application for authority to provide direct service between the U.S. and various international points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 26, 1989; Released: January 4, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on September 25, 1989 by St. Thomas & San Juan Telephone Company, Inc. (STSJ) requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate microwave and connecting facilities for the provision of direct service between the U.S. and various Caribbean points. The application was placed on public notice on October 4, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Anguilla, Antigua, Barbados, Dominica, Dominican Republic, Grenada, Guadeloupe, Haiti, Jamaica, Montserrat, Netherlands Antilles, St. Kitts, St. Lucia, St. Vincent, British Virgin Islands by STSJ.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-169 IS GRANTED, and STSJ is authorized to:

a. acquire from AT&T by indefeasible right of user (IRU) or lease basis and operate half interests in up to 97 voice-grade circuits in microwave facilities between STSJ's St. Thomas earth station and the points listed below;

b. lease and operate necessary connecting facilities; and

c. use said facilities to provide STSJ's regularly authorized services including switched voice service, between the U.S. and the following points and beyond:

Country	No. of Voice-Grade Circuits
Anguilla	2
Antigua	24
Barbados	2
Dominica	2
Dominican Republic	10
Grenada	2
Guadeloupe	3
Haiti	4
Jamaica	5
Montserrat	2
Netherlands Antilles	3
St. Kitts	10
St. Lucia	2
St. Vincent	2
British Virgin Islands	24

3. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

EASTERN TELELOGIC CORPORATION — File No. I-T-C-90-003

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 26, 1989; Released: January 4, 1990

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on September 26, 1989 by Eastern Telelogic Corporation (ETC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on October 18, 1989. No comments were received.

2. The applicant is a non-dominant domestic resale common carrier. ETC has also been authorized to resell the international switched voice services of other common carriers.[1] ETC now requests authority to add RCI Corporation (RCI) and TRT International, Inc. to the list of carriers whose services it is authorized to resell. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[2] We find that the market will support additional carriers and that the added competition will be in the public interest. [3]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by ETC.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-90-003, IS GRANTED, and ETC is authorized to provide international switched voice services by the resale of the international switched voice services set forth in RCI's Tariff F.C.C. No. 2 between the United States and the points listed in that tariff and the international switched voice services of TRT pursuant to contract.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] U.S. Long Distance, Inc., *et al.*, 4 FCC Rcd 4958 (1989).

[2] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[3] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO.

File No. I-T-C-90-004

Application for authority to acquire and operate facilities for service between the U.S. and Aruba

ORDER AND AUTHORIZATION

Adopted: December 26, 1989; Released: January 4, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 13, 1989 by American Telephone & Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate additional facilities for service between the U.S. and Aruba. The application was placed on public notice on October 18, 1989. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-004 IS GRANTED, and AT&T is authorized to:

a. use for service to Aruba its interest in two voice-grade circuits in the third Florida-St. Thomas cable and two circuits in the NAG cable previously assigned for service to the Netherlands Antilles;

b. acquire on an IRU basis from Lands Radio a one-half interest in and operate two voice-grade circuits in the Curacao-Aruba Microwave system; and

c. use said facilities to provide AT&T's regularly authorized services between the U.S. and Aruba and beyond.

3. No substantial changes inconsistent with this or any other relevant Commission order shall be made before final execution of an IRU agreement between AT&T and Lands Radio, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-90-005

Application for authority to acquire and operate facilities for direct service between the U.S. and Mexico.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 26, 1989; Released: January 4, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 12, 1989 by US Sprint Communications Company Limited Partnership (US Sprint), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate facilities for direct service between the U.S. and Mexico. The application was placed on public notice on October 18, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Mexico by US Sprint.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-005 IS GRANTED, and US Sprint is authorized to:

a. lease from AT&T and operate 400 voice-grade circuits between US Sprint's Offices and various U.S.-Mexico border crossing points[1]; and

b. use said facilities to provide US Sprint's regularly authorized services, including switched voice, between the U.S. and Mexico and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between US Sprint and its correspondent in Mexico, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] **BORDER CROSSING POINTS**

AT UNITED STATES	AT MEXICO	CKT QUANTITY STARTUP
SAN ISIDRO, CA	TIJUANA, B.C.	100
EL PASO, TX.	CD. JUAREZ, CHIH.	100
MCALLEN, TX	REYNOSA, TAMPS.	50
LAREDO, TX	NUEVO LAREDO, TAMPS	100
NOGALES, AR.	NOGALES, SON.	50

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-595

In the Matter of

Amendment of Section 73.202(b), RM-5857
Table of Allotments,
FM Broadcast Stations.
(Beloit, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 13, 1989; Released: January 4, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd (1988), issued in response to a petition filed by Solomon Valley Broadcasting, Inc. (petitioner), requesting the substitution of FM Channel 288C2 for Channel 288A at Beloit, Kansas. The *Notice* also proposed the modification of the license for Station KVSV-FM, Beloit, to specify operation on the new channel. Petitioner filed comments in support of the *Notice*. KNZA, Inc., filed late comments. Petitioner, Manhattan Broadcasting Company and Kaw Valley Broadcasting filed reply comments.

2. In a separate but related proceeding initiated by KNZA, Inc., the Commission proposed substituting Channel 268C2 for Channel 280A at Hiawatha, Kansas, and modification of the license of Station KNZA-FM to specify operation on Channel 280C2. *See*, MM Docket 87-36, 2 FCC Rcd 1517 (1987). Manhattan Broadcasting Company filed a counterproposal requesting the substitution of FM Channel 268C2 for Channel 269A at Manhattan, Kansas, and modification of its license for Station KMKF to specify operation on Channel 268C2.[1] Manhattan Broadcasting Company further proposed the substitution of Channel 280C2 for Channel 280A at Hiawatha, Kansas, allowing upgrades at Manhattan and Ogden, Kansas. To accommodate Channel 280C2 at Hiawatha, a substitution would be required at Ogden, Kansas. Manhattan Broadcasting Company proposed the substitution of Channel 288A for 280A at Ogden. However, Channel 288A at Ogden would conflict with Channel 288C2 at Beloit, Kansas. Channel 278A was suggested as an alternate solution for Ogden. In accordance with that suggestion, we directed an *Order To Show Cause* to Kaw Valley Broadcasting Co., license of the station at Ogden, why its channel should not be changed from 280A to 278A. *See* 4 FCC Rcd 3795 (1989). Kaw Valley has agreed to the substitution of channels.[2] Simultaneously with the adoption of this *Report & Order* we have adopted a *Report & Order* in MM Docket 87-36, substituting Channel 280C2 for Channel 280A at Hiawatha, Kansas, Channel 278A for 280A at Ogden, Kansas, and Channel 268C2 for Channel 269A at Manhattan, Kansas. The allotment of Channel 278A rather than Channel 288A at Ogden removes the conflict that existed between Ogden and Beloit, allowing the Commission to proceed with petitioner's request for an upgrade at Beloit.

3. We believe the public interest would be served by the substitution of FM Channel 288C2 for Channel 288A at Beloit, since it could provide the community with its first wide coverage area FM service. The substitution can be made in compliance with the minimum distance separation requirements of the Commission's Rules at the current site of Station KVSV-FM. [3] We have authorized a modification of petitioner's license for Station KVSV-FM, Beloit, Kansas, to specify operation on Channel 288C2 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 20, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Beloit, Kansas	288C2

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Solomon Valley Broadcasting, Inc. for Station KVSV-FM, Beloit, Kansas, IS MODIFIED TO SPECIFY operation on Channel 288C2 in lieu of Channel 288A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the counterproposal was given on May 20, 1987, Report No. 1661 (RM-5923).

[2] Although Kaw Valley Broadcasting agreed to the substitution of channels to accommodate upgrades at Hiawatha and Manhattan, Kansas, it stated its desire for a C2 Channel at Ogden. In response to its expression of interest, we shall issue a *Notice* proposing to upgrade Channel 278A to Channel 278C2 at Ogden, Kansas.

[3] The coordinates for Channel 288C2 at Beloit are 39-26-53 and 98-04-44.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-537

In the Matter of

Amendment of Section 73.606(b), RM-6039
Table of Allotments,
Television Broadcast Stations.
(Kingston and Oneonta, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 14, 1989; Released: January 4, 1990

By the Chief, Allocations Branch:

1. At the request of WMHT Educational Telecommunications Corporation (petitioner), licensee of public broadcasting Stations WMHT-FM and WMHT-TV, Schenectady, New York, the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 7361 (1987), proposing the deletion of noncommercial educational Channel *42 from Oneonta, New York, and its reallocation to Kingston, New York, as the community's first local noncommercial educational service.[1] Petitioner filed supporting comments and reply comments. WSKG Public Telecommunications Council, licensee of noncommercial educational Stations WSKG-FM and WSKG-TV ("WSKG"), filed comments and reply comments in opposition.

2. As stated in the Appendix to the *Notice*, continuing interest is required before a channel will be allotted to a community. However, on October 3, 1989, petitioner filed a request to withdraw its petition for rule making, stating that it no longer desires the reallotment of Channel *42 from Oneonta to Kingston, and that it will not apply for the channel, if reallotted. No other party filed comments expressing an intention to apply for the channel at Kingston. Therefore, we will grant petitioner's request to dismiss its petition.

3. Accordingly, IT IS ORDERED, That the petition of WMHT Educational Telecommunications Corporation to reallot noncommercial educational Channel *42 from Oneonta to Kingston, New York, IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The *Notice* was issued under the petitioner's former name, Mohawk-Hudson Council on Educational Television, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-621

In the Matter of

Amendment of Section 73.202(b), RM-7063
Table of Allotments,
FM Broadcast Stations.
(Kerrville, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 14, 1989; Released: January 4, 1990

By the Chief, Allocations Branch:

1. At the request of Guadalupe Communications, Inc. (petitioner), permittee of Station KITE(FM), Channel 221A, Kerrville, Texas, the Commission considers herein a petition for rule making proposing the substitution of Channel 222C2 for Channel 221A at Kerrville and the modification of its permit to specify operation on the new channel. Petitioner states that it is willing to relocate its current transmitter site in order to apply for the higher powered channel.

2. The allotment of Channel 222C2 at Kerrville can be made consistent with the Commission's minimum distance separation requirements with a site restriction of 4.8 kilometers (3 miles) northwest of the city.[1] Since Kerrville is located within 320 kilometers (199 miles) of the U.S.-Mexican border, we must obtain concurrence of the Mexican government for the proposal.

3. As requested, we shall propose to modify the construction permit of Station KITE(FM) to specify operation on Channel 222C2 in lieu of Channel 221A in accordance with Section 1.420(g) of the Commission's Rules. Therefore, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Kerrville.

4. In view of the fact that Kerrville, Texas, could receive an additional wide coverage area FM service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Kerrville, Texas	221A, 232C2	222C2, 232C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 26, 1990,** and reply comments on or before **March 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Lawrence Roberts, Esq.
Mark N. Lipp, Esq.
Mullin, Rhyne, Emmons and Topel, P.C.
1000 Connecticut Avenue, N.W.
Suite 500
Washington, D. C. 20036
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 30-05-00 and 99-10-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-620

In the Matter of

Amendment of Section 73.202(b), RM-7125
Table of Allotments,
FM Broadcast Stations.
(Hayward, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 14, 1989; Released: January 4, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Pine-Aire Broadcasting Corporation, Inc. (petitioner), licensee of Station WRLS-FM, Channel 221A, Hayward, Wisconsin, requesting the substitution of Channel 222C3 for Channel 221A at Hayward and the modification of its station's license to specify operation on the higher powered channel. Petitioner states an intention to apply for the channel, if allotted.

2. Channel 222C3 can be allotted to Hayward in compliance with the Commission's minimum distance separation requirements at the site specified by the petitioner.[1] Therefore, as requested, we shall propose to modify the license of Station WRLS-FM at Hayward to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Hayward.

3. In view of the fact that Hayward, Wisconsin, could receive its first wide coverage area FM service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Hayward, Wisconsin	221A, 269A	222C3, 269A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 26, 1990,** and reply comments on or before **March 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Pine-Aire Broadcasting Corporation
c/o Lance W. Riley, Esquire
308 Edina Executive Plaza
Edina, Minnesota 55424
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 46-06-47 and 91-20-07.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-619

In the Matter of

Amendment of Section 73.202(b), RM-7048
Table of Allotments,
FM Broadcast Stations.
(Bridport, Vermont)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 14, 1989; Released: January 4, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Peter S. Morton (petitioner), seeking the allotment of Channel 243A to Bridport, Vermont, as that community's first local FM service. Petitioner states its intention to apply for the channel, if allotted.

2. In order to avoid a potential conflict between this proposal and a separate petition for rule making at Vergennes, Vermont,[1] we have determined that Channel 229A is available for consideration at Bridport. Channel 229A can be allotted to Bridport in compliance with the Commission's minimum distance separation requirements.[2]

3. Since the community of Bridport is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government must be obtained for the proposal.

4. In view of the fact that Bridport could receive its first local FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Bridport, Vermont	---	229A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 26, 1990,** and reply comments on or before **March 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Peter S. Morton
P. O. Box 57
Rupert, VT 05768
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Also pending before the Commission is proposal to allot Channel 244A to Vergennes, Vermont. *See* RM-7154.

[2] The city reference coordinates are 43-59-06 and 73-18-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-618

In the Matter of

Amendment of Section 73.202(b), RM-7060
Table of Allotments,
FM Broadcast Stations.
(Friona, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 14, 1989; Released: January 4, 1990

By the Chief, Allocations Branch:

1. At the request of Lois B. Crain (petitioner), the Commission considers herein a petition for rule making proposing the substitution of Channel 234C2 for Channel 236A at Friona, Texas, and the modification of the construction permit for Station KGRW(FM) at Friona to specify operation on the new channel. Petitioner states she is willing to apply for the higher powered channel, if allotted.

2. Channel 234C2 can be allotted to Friona in compliance with the Commission's minimum distance separation requirements utilizing the site specified by the petitioner.[1] As requested, we shall propose to modify the construction permit of Station KGRW(FM) to specify operation on Channel 234C2 in lieu of Channel 236A in accordance with Section 1.420(g) of the Commission's Rules. Therefore, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Friona.

3. In view of the fact that Friona, Texas, could receive its first local wide coverage area FM service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Friona, Texas	236A	234C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 26, 1990,** and reply comments on or before **March 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Estella Salvatierra, Esq.
Fletcher, Heald & Hildreth
Suite 400
1225 Connecticut Avenue, N.W.
Washington, D. C. 20036-2679
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Petitioner specified a desire to utilize a site 21.6 kilometers (13.4 miles) west of the community. The coordinates are 34-41-17 and 102-56-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-306

In re Application of:

SPECIAL MARKETS MEDIA, INC. (hereafter Special Markets) File No. BPH-860703MH

For a Construction Permit
For a New FM Station
In Raleigh, North Carolina On Channel 275A

HEARING DESIGNATION ORDER

Adopted: November 16, 1989; Released: December 27, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned application for a New FM station.[1]

2. Special Markets' application was returned by the Chief, FM Branch on July 23, 1987, as not acceptable for filing for proposing a site which was short-spaced to the buffer-zone protection afforded to second-adjacent channel station WAKG, Danville, Virginia.[2]

3. On August 24, 1987, Special Markets filed a timely Petition for Reconsideration of its return arguing that its application was acceptable for filing. That Petition was denied in the ensuing Hearing Designation Order for the Raleigh, North Carolina proceeding. [3] Thereafter, on August 18, 1988, Special Markets filed a Petition for Reconsideration seeking full Commission review of the dismissal of its application. In *Special Markets Media, Inc.*, 4 FCC Rcd 5753 (1989) (" *Reinstatement Order* "), the Commission ruled that applicants for construction permits for new FM assignments could have reasonably assumed that the buffer-zone requirement did not apply to them. Therefore, applicants should not have been dismissed for failing to honor the buffer-zone. Consequently, it was ordered that Special Markets' Petition for Reconsideration be granted and its application reinstated. Subsequent studies have found Special Markets' application to be acceptable for filing.

4. On September 26, 1989, Henry R. Malloy, Jr., d/b/a REM Malloy Broadcasting ("Malloy") (File No. BPH-860627MH), a mutually exclusive applicant in the Raleigh proceeding, filed a Petition to Deny against the reinstated Special Markets application. This Petition, however, is untimely. Pursuant to Section 73.3584 of the Commission's Rules, the cut-off date for filing Petitions to Deny was September 19, 1989. However, pursuant to Section 73.3587 of the Commission's Rules, we will still consider the pleading as an Informal Objection.

5. In its Informal Objection Malloy incorporates earlier arguments raised in his August 28, 1989 Petition for Reconsideration of the *Reinstatement Order*. Malloy advances no other argument regarding the acceptability of Special Markets' application other than the fact that Special Markets failed to honor the buffer-zone requirement. However, as previously noted, in the *Reinstatement Order* the Commission found that Special Markets reasonably assumed that the buffer-zone requirement did not apply to its construction permit application for the Raleigh assignment. As the matter raised in the Informal Objection has been previously dealt with and conclusively disposed of in the *Reinstatement Order*, this extraneous pleading will be denied.

6. Special Markets has indicated that it will locate its transmitting antenna on a pole to be added on top of the 76-foot tower occupied by WCPE(FM), which is atop a building at 4812 Six Forks Road in Raleigh. Although the street address is identical to WCPE's authorized location, the coordinates are slightly different. WCPE is licensed at 35^0 50' *47* " North Latitude and 78^0 38' 38" West Longitude; Special Markets' proposed coordinates are 35^0 50' *44* " NL and 78^0 38' 38" WL. Because Special Markets clearly proposes to co-locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in the application, the staff could, drawing on the application as a whole, confidently verify the transmitter location by taking official notice of the street address and existing height of the tower in the Commission's files for WCPE. Accordingly, Special Markets is found to be acceptable for filing. However, Special Markets shall be required to verify the coordinates and to file either proof of the accuracy of its coordinates or a corrective amendment to its application with the presiding Administrative Law Judge within 30 days of the release of this Order.

7. Staff study indicates that the combined operation of WCPE's existing antenna and Special Markets' proposed antenna may significantly exceed the radiofrequency radiation guidelines under 47 C.F.R. § 1.1307(b) at the level of the building roof. Accordingly, Special Markets is required to amend its application within 30 days of the date of this Order to demonstrate compliance with the RF radiation guidelines. The cumulative effect of the proposed operation and all nearby RF sources must be considered. Since the proposal of the applicant may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, Special Markets is required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Special Markets will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Serives Division, who shall then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom., Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

8. On September 12, 1986, Special Markets filed a request for a waiver of 47 C.F.R. § 73.315(a). However, the Commission no longer requires a waiver of the city-grade coverage rule when more than 80% of the community of license will be served within the 3.16 mV/m contour. *See John R. Hughes, Inc.*, 50 Fed. Reg. 5679 (Feb. 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). Since it is readily apparent that

Special Markets' proposal does cover more than 80% of Raleigh, a waiver request is not neccesary and thus will be dismissed as moot.

9. Except as may be indicated by any issues specified below, Special Markets is qualified to construct and operate as proposed. Since the proposal is mutually exclusive with applications previously designated for hearing, it must also be designated in a consolidated proceeding and on the issues specified below.

10. Accordingly IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the application IS DESIGNATED FOR HEARING AND CONSOLIDATED in the proceeding in MM Docket 88-306 and upon the same issues, which are:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That the following issue be added with respect to Special Markets only:

3. If a final environmental impact statement is issued with respect to Special Markets in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

12. IT IS FURTHER ORDERED, That the Informal Objection filed by Malloy IS HEREBY DENIED.

13. IT IS FURTHER ORDERED, That Special Markets submit an amendment either providing proof of its proposed antenna location coordinates or an amendment correcting the stated coordinates with the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That in accordance with paragraph 7 hereinabove, Special Markets shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

15. IT IS FURTHER ORDERED, That the request for a waiver of 47 C.F.R. § 73.315(a) IS HEREBY DISMISSED as moot.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicant and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The application of Special Markets is mutually exclusive with 10 other applications previously designated for a consolidated hearing in MM Docket No. 88-306.

[2] The "buffer-zone" was an additional 16 kilometers of protection (beyond the minimum distance separation requirement provided for in 47 C.F.R. § 73.207) temporarily afforded Class C stations operating with facilities less than the Class C minimum established in the *Report and Order* in BC Docket 80-90, 94 FCC 2d 152 (1983). The purpose of this extra protection, which was in effect from March 1, 1984 to March 1, 1987, was to allow these protected stations some flexibility should they need to move in order to upgrade to meet the Class C minimum. If the protected station did not upgrade within the allotted time, it would be reclassified to a lower class.

[3] *Henry R. Malloy*, 3 FCC Rcd 4375 (M.M. Bur. 1988) (Order designating applicants for Hearing in MM Docket No. 88-306).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 19, 1989

COMMON CARRIER BUREAU TARIFF DIVISION ANNOUNCES TEMPORARY CLOSING OF TARIFF PUBLIC REFERENCE ROOM

The Tariff Division of the Common Carrier Bureau announces that the Tariff Public Reference Room located in room 513, 1919 M Street, N.W. will be closed Tuesday, December 26, 1989. In addition, there will not be a Tariff Transmittal Public Reference Log produced that day. The Reference Room will resume normal hours of operation on Wednesday, December 27, 1989. Those hours are Monday through Friday between 1:30 p.m. to 4:30 p.m.

For further information contact Thomas L. Elcan or Judith A. Nitsche; on (202) 632 - 5550.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MID-PLAINS TELEPHONE COMPANY, INC. AAD 9-1939

Petition for Declaratory Ruling Regarding the Commission's Part 36 Separations Procedures

ORDER

Adopted: December 26, 1989; Released: December 28, 1989

By the Chief, Common Carrier Bureau:

1. The State of Michigan and the Michigan Public Service Commission (Michigan) and the Missouri Public Service Commission (MoPSC) filed, on December 5 and 11, 1989, respectively, motions for extension of time to file comments on Mid-Plains Telephone Company, Inc.'s (Mid-Plains) September 14, 1989 petition for a declaratory ruling regarding the Commission's Part 36 separations procedures. A public notice released November 22, 1989, invited comment no later than December 5, 1989. Michigan requests that it be granted an extension of time to January 5, 1990 to file comments, with reply comments due on January 19, 1990. Missouri requests that it be granted an extension of time to January 8, 1990, with reply comments due on January 22, 1990.

2. Michigan states that, because it utilizes the residual ratemaking methodology at issue in Mid-Plains' petition for the numerous average schedule telephone companies within its borders, it has a direct and significant interest in the outcome of this proceeding. Michigan also states that, given the seriousness of the issues to be addressed and the consequences that may obtain, the two week initial comment period is an insufficient time period in which to prepare substantive and meaningful comments, especially when the time provided is interspersed with holidays. Also, Michigan states that it did not receive the public notice until the week of November 27, 1989. Michigan believes that the additional time will not prejudice any party to the proceeding, but will enable it to provide the Commission with more complete, substantive and meaningful comments.

3. MoPSC states that, because it utilizes the residual ratemaking methodology for the number of small telephone companies operating in Missouri, it has a direct and substantial interest in the outcome of the present proceeding. MoPSC states that it did not receive a copy of the public notice, and only learned of the petition on December 1, 1989. MoPSC also cites the two week initial comment period as inadequate for preparing substantive and meaningful comments, especially when viewed in light of the holiday period encompassed within the comment deadline. MoPSC states that its requested additional time will not prejudice any party to the proceeding and will enable it to provide the Commission with substantive and meaningful comments.

4. We have reviewed Michigan's and MoPSC's request for an extension of time and have determined that good cause has been shown for an extension of time for filing comments and replies. Although extensions for filing comments are not normally granted after the filing date, we believe that an extension of time is appropriate in this instance, in view of the short comment cycle which was interrupted by the Thanksgiving holiday and also the importance of the issues presented to the states. The additional information to be provided by Michigan and the MoPSC, as well as any other state commissions that were unable to file timely comments, will enable the Commission to make a decision that gives full consideration to the important issues that the states raise. We therefore grant Michigan, MoPSC and all other interested parties an extension until January 8, 1990 to file comments, with replies due on January 22, 1990.

5. Accordingly, IT IS ORDERED, that the Motions of the State of Michigan and the Michigan Public Service Commission and the Missouri Public Service Commission for an extension of time to file comments ARE GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the

NECA Study of ARPM
Transition Plan; and
Petition of National Utilities, Inc.
For Relief For High Cost Average
Schedule Companies in Alaska

ORDER

Adopted: December 26, 1989; Released: December 27, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order, we deny the ICORE companies' Petition[1] asking the Commission to strike the National Exchange Carrier Association ("NECA") Report[2] concerning the average schedule transition. [3] We also dismiss, without prejudice, the Petition filed by National Utilities, Inc. ("National")[4] seeking increased average schedule payments for Alaska companies.

II. BACKGROUND

2. On April 11, 1986, the Commission approved proposed revisions to the average schedules that included a four-year transition plan[5] ("plan") to provide supplemental payments for companies that would receive reduced settlements under the average schedules that became effective June 1, 1986.[6] In the filing containing the plan, NECA stated:

> [u]nder the transition, it is estimated that 35 average schedule companies[']' net reduction in settlements will exceed $5.00 per line per month. Additional study is required to determine the treatment to be accorded these companies after the fourth year.[7]

3. On August 16, 1989, NECA filed a Report stating that the transition plan had accomplished its objective, and that "there is no need to extend the . . . plan beyond its scheduled May 30, [sic] 1990 expiration."[8] NECA states that only sixteen companies are expected to receive transition payments in the last year of the transition,[9] adding that "most will receive ... transition payments for reasons unrelated to the original purposes of the plan."[10] In addition, NECA states that "the expiration of the overall . . . transition plan does not necessarily preclude the possibility of individual relief for companies in particularly compelling circumstances."[11] NECA adds that it had offered to assist companies seeking assistance in the preparation of statements "detailing the reasons why individual treatment is necessary."[12] Four of the sixteen affected companies responded by providing statements that NECA forwarded to the Chief, Common Carrier Bureau.[13]

III. PLEADINGS

4. On September 26, 1989, ICORE filed a petition arguing that the Commission approved plan does not terminate on May 31, 1990 as NECA contends. ICORE states:

> NECA should not be heard to argue that the Commission has *already* approved termination of the transition payments as of 1990 . . . . Far from suggesting that transition payments would end after the first four years, NECA's 1985 proposal represented that '[a]dditional study' was required to 'determine the treatment to be accorded' those companies who had not fully completed their transition after the initial four-year period.[14]

ICORE also argues that the transition plan cannot be terminated without a full notice and comment Rule Making proceeding pursuant to Section 553(b) of the Administrative Procedure Act.[15] ICORE also contends that NECA's Report should be stricken because it was not filed prior to June 30, 1989, as required by Section 69.606(b) of the Commission's rules for average schedule revisions that are to be effective in 1990.

5. In response, NECA argues that its Report does not constitute a revision to the average schedule formula because the transition expires by its own terms on May 31, 1990.[16] As a consequence, NECA contends that the Report does not fall within the filing requirement contained in Section 69.606(b).[17] NECA also argues that its Report was filed in a timely manner even if it is construed as a revision to the formula because the filing deadline for proposed revisions has been changed to December 31 of the year preceding the effective date of the revisions.[18] Finally, NECA contends that notice and comment Rule Making procedures are not required even if the Commission were to determine that the Report was a proposed revision to the average schedule formula. NECA emphasizes that although revisions to the average schedules do not constitute Rule Making,[19] "all affected parties have received individual notice of NECA's *Report* and an opportunity to comment on the substance of NECA's findings, as well as the opportunity to petition the Commission for individual relief."[20]

6. On October 27, 1989, National filed a petition that sought to have this Commission request a NECA study examining the need for a "permanent multiplier factor for high cost average schedule companies in Alaska for whom the expiration of the [1986 average schedule] transition plan. . . would pose a hardship . . . ."[21] National also requests an extension of the existing transition at fourth year payment levels until permanent relief is implemented.[22] In support of this request, National argues that the NECA average schedules do not reflect the cost of providing telephone service in Alaska, and that National's customers and shareholders will experience significant hardship due to the termination of the transition plan.[23]

7. NECA opposes National's request for the establishment of a special Alaska factor in the average schedule formula, but urges the Commission to consider further transitional relief for National.[24] In response, National argues that NECA has failed to provide valid reasons for not initiating a study into the need for a permanent

multiplier factor for Alaska.[25] In addition, National states that the transitional relief supported by NECA is inadequate.[26]

IV. DISCUSSION

A. The NECA Report

8. Contrary to ICORE's assertion, the NECA transition plan approved by the Commission ends by its own terms on May 31, 1990. NECA's 1985 revisions to the average schedules describe the plan as a four-year transition, and the Commission's approval of those modifications to the average schedule formula states that the transition plan would terminate after four years.[27] NECA did not represent that the transition plan would extend beyond May 31, 1990, although it stated that further study would be necessary to determine whether additional transitional relief would be required after May 31, 1990.[28] NECA's study, submitted on August 16, 1989, concluded that no extension of the transition plan was warranted.[29] Thus, NECA's Report did not constitute a proposal to modify the average schedule formula that the Commission approved in 1986.[30] The Report does not propose any action. The Report merely provides advance notice that the next average schedule revisions that NECA will file for Commission approval will not include supplemental payments for companies that received supplemental payments pursuant to that transition plan.[31]

9. We accordingly deny the ICORE petition insofar as it asks us to strike the NECA Report. If ICORE believes that additional supplemental payments are warranted or objects to any other aspect of the plan NECA will submit, ICORE should present its views in the proceeding we will establish to examine the December, 1989 filing that NECA is required to make pursuant to Section 69.606(b) of the Commission's rules.

B. National Petition and Other Requests for Supplemental Relief

10. We also dismiss the National Petition without prejudice. National may, of course, seek whatever relief it believes appropriate in the pleading cycle that we will establish to examine the average schedule revisions (or certification that no revisions are necessary)[32] that NECA will file by December 31, 1989. Any other average schedule company seeking supplemental payments or any other modification of the revisions submitted by NECA should present its views in the context of that proceeding. This will ensure that such requests reflect any average schedule revisions proposed by NECA and permit the Commission to provide consolidated treatment, on an annual basis, of all proposed modifications to the average schedule formula for the ensuing year.[33] This is the procedure that was contemplated by the Commission rules that were adopted to establish an orderly process for the revision of the average schedule formula.

V. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED, that the petition of the ICORE local exchange carriers IS DENIED to the extent stated herein.

12. IT IS FURTHER ORDERED, that the National Petition IS DISMISSED without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Petition of the ICORE Companies To Strike, or In The Alternative For Formal Notice and Comment Rule Making Procedures (Sept. 26, 1989) ("ICORE Petition").

[2] NECA Report In the Matter of: NECA Study of ARPM Transition Plan (Aug. 16, 1989) ("NECA Report").

[3] ICORE also argues that termination of the transition payments constitutes a revision of the average schedules that cannot be implemented without a notice and comment Rule Making proceeding. ICORE Petition at 4-7. We find that the transition terminates by its own terms on May 31, 1990, and do not reach the question of what procedures are required for modification of the average schedules.

[4] Petition of National Utilities, Inc. For Relief For High Cost Average Schedule Companies In Alaska (Oct. 27, 1989) at 1 ("National Petition").

[5] MTS and WATS Market Structure: Average Schedule Companies, 103 FCC 3d 1017 at 1022 (1986)(" *Average Schedule Order* ").

[6] During each of the four years in the transition, payments decreased at the annual rate of $1.25 per access line per month. NECA Modification of Average Schedules (filed Sept. 17, 1985) at 19.

[7] *Id.* at 19 n.11.

[8] NECA Report at 3.

[9] The fourth year of the transition began on June 1, 1989, and ends on May 31, 1990. In its September 17, 1985 filing, NECA had estimated that approximately 35 companies would receive transition payments at the conclusion of the plan. NECA now estimates that no more than sixteen companies will receive transition payments during the fourth and final year of the transition.

[10] *Id.* (footnote omitted). NECA's study also includes information on each of these sixteen companies. *Id.* at Attachments 1-16.

[11] *Id.* at 3.

[12] *Id.*

[13] *Id.* at 4; Letter from J. R. Naset, NECA Vice President-Industy Relations, to Dr. Gerald Brock, Chief, Common Carrier Bureau (Aug. 16, 1989).

[14] ICORE Petition at 3.

[15] *Id.* at 4-7. *See, generally*, 5 U.S.C. § 553(b).

[16] NECA Opposition (filed Oct. 6, 1989) at 2-5. NECA states that: (1) its 1985 filing containing the transition plan specified that the plan would only apply for four years; (2) the Commission explicitly stated that the transition was a four-year plan with non-recurring payments, rejecting claims by ICORE that the four-year transition was too short; and (3) the United States Court of Appeals for the District of Columbia Circuit upheld the Commission's determination that the four-year transition was adequate. *Id.* at 3-4.

[17] *Id.* at 2-4.

[18] *Id.* at 4-5.

[19] *Id.* at 5-6.

[20] *Id.* at 6. NECA states that a general notice of proposed Rule Making is not required under 5 U.S.C. § 553(b) if "persons subject thereto are named and either personally served or otherwise have actual notice thereof . . . ." *Id.* at 6, n.14, *citing* 5 U.S.C. § 553(b).

[21] National Petition at 1.

[22] *Id.*

[23] *Id.* at 9-11.

[24] NECA Comments (filed Nov. 28, 1989) at 1.

[25] Response of National Utilities, Inc. to Comments of National Exchange Carrier Association, Inc. Regarding Petition for Relief for High Cost Average Schedule Companies in Alaska (filed Dec. 7, 1989) at 1-4.

[26] *Id.* at 5-6.

[27] NECA Modification of Average Schedules (Sept. 17, 1985) at 19-20; *Average Schedule Order* at 1022, 1025-26. On appellate review, the Court described the 1985 NECA average schedule revisions as including a four year transition plan, noting that NECA planned to study the companies that would experience further reductions after completion of the transition. The Court rejected petitioners' challenges to this aspect of the average schedule revisions. City of Brookings v. FCC, 822 F.2d 1153 at 1159, 1170-71 (D.C. Cir. 1987).

In proposing a longer transition in its comments on the September 17, 1985, NECA filing, ICORE also appears to have understood that the transition plan proposed by NECA (and subsequently approved by the Commission) would, by its terms, conclude at the end of what ICORE described as a three year transition. ICORE Reply Comments (Jan. 6, 1986) at 13 ("This Commission should reject NECA's efforts to justify its severe flash-cut proposal and brief three-year transition period through dire warnings that some companies are receiving improper or excessive common-line settlements."); ICORE Comments On The Proposed Revisions To the Average Schedule Formulas (Dec. 6, 1985) at 14 ("The Commission is asked to approve the new average schedules with no clue as to how these 35 companies will be treated after the fourth step."); *id* at n.32 ("The settlement reductions left unresolved at the end of the NECA transition are substantial. Fully 90 percent of the reduction NECA proposes for the Summit Telephone and Telegraph Co. will remain at the end of the proposed NECA transition . . . . Thus, after facing the substantial reductions NECA proposes for each year of its transition program, these companies could face another 'flash-cut' of truly substantial proportions after the current NECA proposal has ended."). These earlier statements by ICORE are inconsistent with the construction that ICORE now seeks to place upon NECA's transition plan.

[28] NECA Modification Of Average Schedules (Sept. 17, 1985) at 19, n.11; NECA Reply (Jan. 6, 1986) at 20, n.24. ("With respect to the 34 exchange carriers remaining at the end of those four steps, further consideration will be given to transition mechanisms as experience is obtained with the new schedules."); *id.* at n.21 ("NECA maintains that its proposal is reasonable. Any subsequent steps were purposely left open so that a final determination can be made after actual experience is obtained.").

[29] NECA Report at 3.

[30] While NECA noted that the Commission might wish to consider individual relief on a company-specific basis, it did not endorse additional transition payments for any particular average schedule company or companies. NECA Report at 16.

[31] Section 69.606(b) requires NECA to submit "a proposed revision of the formula for each annual period subsequent to December 31, 1986 or certify that a majority of the directors of the association believe that no revisions are warranted for such period on or before *December 31* of the preceding year." Access Tariff Filing Schedules, 3 FCC Rcd 5495, 5497, 5500 (1988) (emphasis supplied).

[32] *See* note 31, *supra*.

[33] *See* Section 4(j) of the Communications Act, 47 U.S.C. § 154(j).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 26, 1989

Released: January 5, 1990

Gulf Coast Radio, Inc.
Corporate Drive, No. 550
Clearwater, Florida 34622

Great American Television and
Radio Company, Inc.
1718 Young Street
Cincinnati, Ohio 45210

Dear Applicants:

This letter is in reference to your application (BALH-891017GK) seeking the Commission's consent to the assignment of the license of station WKLR(FM), Clearwater, Florida, from Gulf Coast Radio, Inc., to Great American Television and Radio Company, Inc. ("Great American").

Great American is now the licensee of station WTSP-TV (channel 10, ABC), St. Petersburg, Florida. The station places a Grade A contour well beyond Clearwater, which is in the Tampa-St. Petersburg market. Section 73.3555(b) of the Commission's rules generally provides that television/radio combinations cannot be created where the Grade A contour of the television station encompasses the city of license of the radio station. Accordingly, Great American has requested a waiver of the rule. In support of its waiver request, Great American correctly notes that Arbitron ranks Tampa-St. Petersburg as the 14th largest market. Great American has also established that there will be 41 separate broadcast voices in that market, after the proposed purchase.

In *Amendment of Section 73. 3555*, 4 F.C.C. Rcd. 1741, *reconsidered in part*, 4 F.C.C. Rcd. 6489 (1989), we set out standards for reviewing requests for waivers of the rule. We concluded that we would look favorably on waiver requests in the top 25 markets, where 30 or more voices would remain after the proposed combination. 4 F.C.C. Rcd. at 1751. Because Tampa-St. Petersburg is the 14th largest market, and because there will be more than 30 separate voices in that market after the proposed assignment, Great American meets this standard. Accordingly, its request for waiver of section 73.3555(b) is granted.

We further find that the applicants are fully qualified and that a grant of the application will serve the public interest, convenience and necessity. Accordingly, the application (BALH-891017GK) is granted, effective on the date of adoption of this letter.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-355

In re

Potential Uses of Certain Orbital
Allocations by Operators in the
Direct Broadcast Satellite Service

ERRATUM

Released: September 27, 1989

The Notice of Proposed Rule Making (FCC 89-258) regarding the above-captioned matter cited at 4 FCC Rcd 6306 is corrected by changing the Bureau designator from "CC Docket 89-355" to "MM Docket 89-355".

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

January 1, 1990
Local Exchange Carrier
Access Tariff Filings

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1989; Released: December 21, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In their access tariff filings, the local exchange carriers (LECs) are required to file rates that comply with Commission Rules and are targeted to recover no more than the authorized rate of return for interstate access services. The instant Order examines updates and mid-course corrections of the "annual" 1989 access tariff filings, which became effective on April 1, 1989.These filings would reduce interstate access rates by $815 million. End user charges would increase by $42 million, switched access rates would decrease by $790 million, special access rates would decrease by $21.5 million, and directory assistance access rates would decrease by $4 million on an annualized basis for the period from January 1, 1990, through June 30, 1990. This Order reviews the LECs' filings and petitions filed against certain aspects of those filings, suspends some revisions, rejects other revisions, and orders certain corrections to the rates that must be filed before the scheduled effective date of January 1, 1990.

II. BACKGROUND

2. Under the Access Rules, Part 69 of the Commission's Rules, 47 C.F.R. Part 69, most LECs are required to update their access tariffs each year to retarget rates to the authorized rate of return, based upon projections of costs and demand in the upcoming access year. For several years, the annual revisions were filed to become effective on January 1. In its *Access Schedule Order*, the Commission shifted the access year to a July-June period beginning in 1990 and established two 15-month transitional access tariff periods.[1] As a result, tariffs that became effective on April 1, 1989, are to remain in effect until replaced on July 1, 1990.

3. Because many LECs stated that it would be difficult for them to develop reliable forecasts extending into the first half of 1990, the Common Carrier Bureau (Bureau) allowed the LECs to base their April 1, 1989 rates on an April-through-December 1989 test period. We stated that we would require the LECs to make a simplified filing effective January 1, 1990 to reflect certain changes affecting rate computations that would occur in the 1990 calendar year.[2]

4. On September 1, 1989, this Bureau released the *TUF Order* detailing a simplified rate correction methodology for the LECs' November 2, 1989 filing of updates to their access tariff rates to implement a limited set of changes for the January through June 1990 period. [3] The *TUF Order* permitted LECs to use correspondingly simplified cost support material to support the rate changes.[4] LECs were also permitted to use other methods to implement the scheduled changes, but would then be required to submit the normal support information specified in the Commission's Rules. Specific data submissions were detailed in the Tariff Update Format (TUF) appended to the *TUF Order*.[5]

5. Attachment A lists the LECs that filed in response to the *TUF Order*. Petitions to reject or suspend and investigate updated tariffs were filed by Ad Hoc Telecommunications Users Committee (Ad Hoc); Allnet Communication Services, Inc. (Allnet); American Telephone and Telegraph Company (AT&T); and MCI Telecommunications Corporation (MCI). In addition, NET, SWB, Contel, Rochester, GTE, Roseville, Centel, Ameritech, US West, and United filed separate pending midcourse filings to adjust rates based upon retargeting rates to earn no more than the authorized rate of return.[6] MCI filed a petition against the Rochester and Centel mid-course corrections; each filed reply comments.

III. TARIFF UPDATE FILINGS

6. The *TUF Order* limited the factors to be included in the streamlined filing format to changes in: (1) the Subscriber Plant Factor (SPF), (2) Dial Equipment Minutes (DEMs), (3) prescribed depreciation rates, (4) the amortization of inside wire, and (5) trends in Common Line (CL) costs and demand.[7] The *TUF Order* required each LEC to display in the TUF the projected changes in its costs, demand, and rates associated with these factors in a step-by-step format. The starting point of the TUF is the information filed by the LEC to support its annual 1989 access rates. The LEC must adjust this baseline to reflect exogenous changes in (1) through (5) above and thereby calculate rate adjustment factors (RAFs) to be applied to currently effective rates. The carrier common line (CCL) terminating rate and the various end-user changes are to be calculated in a similar manner, but without reference to a RAF. The issues raised by the TUF filings and the pleadings that followed are discussed below.

A. BFP Factor

1. *Background*

7. Sections 69.501 and 69.502 of the Commission's Rules, 47 C.F.R. §§ 69.501, 69.502, specify the allocation of Common Line (CL) revenue requirements between the Carrier Common Line element (CCL) and the End User Common Line element (EUCL). Section 69.501 assigns the revenue requirements of four categories of CL investment to CCL, and defines the remainder of the CL revenue requirement as the Base Factor Portion (BFP).[8] The projected revenues from EUCL are deducted from the BFP, and the remainder of the CL revenue requirement is allocated to CCL. *See* Section 69.502 of the Commission's Rules. In the *TUF Order*, we allowed LECs to update their CL rates based upon extrapolation of actual growth of BFP and demand in the first half of 1989 as compared

to the first half of 1988. All filing LECs applied this simplified approach to computing growth rates to project CL costs and demand in the first half of 1990 and computed their rates on that basis.

2. *Positions of the Parties*

8. AT&T has developed its own evaluative formula for growth in revenue requirements for the BFP of total CL costs, and contends that 20 LECs have projected unusually high growth.[9] AT&T asserts that rates based on these projections should be suspended and investigated.[10] AT&T Petition at 1-4.

9. The LECs generally argue that they have followed the calculation methodology established by the Bureau in the *TUF Order* and that AT&T's calculation is therefore irrelevant. Further, they argue, AT&T's methodology is inferior to that developed by the Bureau in the *1989 Access Order*.[11] Finally, various LECs argue that their unique circumstances justify higher BFP cost showings.[12]

3. *Discussion*

10. We have reviewed AT&T's allegations about the 20 "outliers" on AT&T's scale of BFP costs per loop. After reviewing the LEC submissions, we are satisfied, with one exception, that the LECs have followed the methodology for BFP growth adopted in the *TUF Order* as a reasonably accurate, simplified method for updating CL rates under the special circumstances of this filing. The *TUF Order* allowed LECs to extrapolate actual growth in BFP for 1989 over 1988 into the first half of 1990. The fact that some LECs had actual BFP cost growth more than one standard deviation above the mean does not persuade us that these LECs have submitted inaccurate information on their TUF forms, or that the use of the recent actual growth is not adequate for purposes of this filing. Some variation is inevitable. While AT&T's analysis is interesting insofar as it highlights where growth is higher than average, we are not persuaded that all the "outliers" on AT&T's evaluative scale warrant investigation.[13]

11. The one potential exception is GTE. AT&T's analysis reveals that GTE demonstrates a consistent pattern of anomalously high growth in BFP cost per loop. For example, we have replicated AT&T's methodology, and have found that no non-GTE LEC reports growth above 13 percent. In contrast, 10 of the 31 GTE study areas project growth in BFP over 13 percent, the highest being GTE South (Georgia) at 29.8 percent.[14]

12. We find this result implausible, and we are not persuaded that GTOC's filing or reply comments adequately explain it. It seems very possible that the data reflect either a systematic error in methodology or some unusual circumstance that may cause the recent reported growth in BFP to be unreliable for the future. We find that such anomalous growth rates demand investigation, and that such investigation is likely to result in substantial rate reductions. We are accordingly suspending and investigating the common line rate revisions (including SLC and CCL revisions) of those GTE tariff entities containing one or more study areas with these questionable BFP growth rates; these are: GTE South, Inc., GTE North-Illinois, GTE North - Indiana, GTE North - Wisconsin, Hawaiian Telephone Company, and GTE Florida.[15] We will designate issues for investigation and establish a pleading cycle in a subsequent order.

B. Depreciation Expenses

1. *Background*

13. Pursuant to Section 220(b) of the Communications Act, 47 U.S.C. § 220(b), the Commission prescribes depreciation rates for many LECs.[16] To ensure that these depreciation rates reflect current operating conditions, the Commission reviews and represcribes each year the rates of approximately one-third of the carriers that are subject to depreciation prescriptions. This usually means that, for these carriers, Commission staff issues a Public Notice recommending revised depreciation rates. Based upon this recommendation and comments received in response to the Public Notice, the Commission prescribes the depreciation rate for the carriers. In the *TUF Order* we established depreciation rates as one of the factors LECs should use in updating their rates. *TUF Order*, 4 FCC Rcd at 6773. We had previously stated, in the *1989 Access Order*, that we would accept reasonable projections of depreciation expenses associated with depreciation rate represcription as a basis for computing access tariff rates. *1989 Access Order*, 4 FCC Rcd at 3654.

2. *Positions of the Parties*

14. MCI and Ad Hoc note that Bell Atlantic's filing includes an annual depreciation expense increase that Bell Atlantic expects for C&P of Virginia following its represeciption in June 1990. The petitioners argue that Bell Atlantic should not be allowed to recover an expense it will not incur for six months, if at all. Even if the new rate does become effective, they argue, it will be effective very near the end of the access tariff period. MCI Petition at 2-4; Ad Hoc Petition at 3-5. MCI also asserts that Wisconsin Bell, Pacific Northwest Bell (PNB), Southern Bell, and Southwestern Bell have included depreciation rates that are not yet in effect. MCI Petition at 4.

15. The LECs reply that Commission policy allows and encourages the inclusion of depreciation expenses reflecting depreciation rates that, while not yet in effect, are reasonably likely to become effective during the tariff period.[17] Bell Atlantic argues that it is appropriate to allow C&P of Virginia to recover for increases in depreciation expenses that are likely to be approved in June 1990, because the new rates will be made effective as of January 1, 1990. Bell Atlantic Reply at 1-3.[18] The LECs also assert that MCI's implication that these depreciation rates are not yet even proposed is inaccurate.[19] Southwestern Bell, noting that no one except MCI filed petitions challenging its depreciation expense projections, claims that MCI raises only ratemaking issues, not depreciation rate prescription issues. Southwestern Bell Reply at 5-6.

3. *Discussion*

16. In the past, the Bureau has accepted projected depreciation expenses when the projections were based on depreciation rates recommended but not yet prescribed by the Commission, or on reasonable projections of depreciation rates by companies whose depreciation rates are scheduled for review in the following year. *See 1989 Access Order*, 4 FCC Rcd at 3654. If the staff has not yet recommended a depreciation rate, we have generally considered LEC projections reasonable if the projected depreciation rate is no higher than the composite depreciation rate of the carriers actually reviewed during the previous year. On this basis, MCI's general objection to LECs'

depreciation expenses that reflect adjustments to depreciation rates likely to become effective in 1990, but not yet formally prescribed, is unfounded.

17. The *TUF Order* allowed LECs to use the streamlined TUF filing to reflect changes in their depreciation rate. A LEC wishing to make other changes affecting its depreciation expense could do so through a separate transmittal with full cost support. Thus, the depreciation expenses shown in the TUFs should be calculated by applying any change in the depreciation rate to the existing depreciation expense shown in the annual 1989 tariff. However, our review of the projected depreciation expenses indicates that three LECs have projected excessive depreciation rates, which have resulted in unreasonably high depreciation expenses.[20]

18. C&P of Virginia is scheduled for a depreciation rate review in 1990, and anticipates a depreciation rate that exceeds by $2.5 million the composite rate of carriers reviewed in 1989. The depreciation rates of both Southwestern Bell and GTE North were reviewed and recommendations issued in 1989, although no formal Commission statement has yet been issued. Both carriers have projected depreciation expense that has been calculated using a depreciation rate that exceeds both their existing prescribed rate, and their 1989 recommended rate. We accordingly reject the tariff rates reflecting those depreciation rates other than the GTE North rates that are subject to suspension and investigation. Our calculations of reasonable, allowable depreciation levels are shown in Attachment C. These carriers are directed to file, by December 28, 1989, revised rates to replace the rejected rates and to implement the required and scheduled changes specified in the *TUF Order*. These LECs may also reflect a depreciation expense projection that does not exceed the Attachment C calculations.[21] The corrected depreciation expenses should also be used by NECA in its Common Line calculations.

C. CL Demand

1. *Background*

19. The Carrier Common Line revenue requirement is recovered by premium and non-premium access rates. Premium access rates are charged for access substantially equivalent to the access provided for MTS and WATS services, and non-premium rates are usually charged for access that is less than substantially equivalent.[22] The charge per minute for non-premium access is set at 45 percent of the charge for premium access.[23] In the *TUF Order*, the Bureau required LECs to provide information showing trends in CL costs and demand from the first six months of 1988 to the first six months of 1989, as an indication of the trends that might be expected to continue into the first six months of 1990. *TUF Order*, 4 FCC Rcd at 6774. The LECs were permitted either to use this method to compute common line rates or to base their rates on normal cost support information.

2. *Positions of the Parties*

20. MCI alleges that Bell Atlantic, GTE, Southwestern Bell, and US West have projected increases in non-premium CL demand much greater than the average LEC, and asserts, on the basis of a linear regression analysis of historical CL demand, that Bell Atlantic understates premium CL minutes. MCI Petition at 8-10, and Ex. 1-4. MCI makes two arguments concerning LECs' forecast of demand growth. The first argument concerns Bell Atlantic's demand forecast. While conceding that Bell Atlantic followed the procedure given in the *TUF Order* for forecasting demand, MCI avers that a trend regression analysis of Bell Atlantic's minutes of use (MOU) would give a much higher forecast of MOU, yielding a premium terminating rate of $0.0135 instead of $0.0141. *Id.* at 8.

21. MCI's second argument applies to GTE, Soutwestern Bell, and US West. MCI claims these companies have calculated comparatively smaller increases in premium demand, coupled with comparatively larger increases in non-premium demand. This contrasts sharply with the demand forecasts of the other companies. MCI states it believes some of the premium demand may have been misclassified as non-premium demand. *Id.* at 9. This would lead to lower chargeable MOUs, and thus a higher terminating rate.

22. Bell Atlantic in its reply notes that as MCI admits, Bell Atlantic used the methodology described in the *TUF Order*.[24] It further claims MCI has provided no basis on which to discard this methodology. Moreover, Bell Atantic asserts, even were the Commission to discard the methodology established in the *TUF Order*, the Commission should permit the use of more sophisticated models of demand than the simple trend proposed by MCI.[25]

23. GTE replies that it used actual billed units, not estimates, to determine the growth rate used in the *TUF Order*.[26] GTE notes that its total MOU growth rate is the highest of all the LECs. It also states that because several of its operating companies operate in more rural and less concentrated areas, less of its traffic is served by an equal access end office. It is GTE's companies with lower equal access conversion rates, GTE claims, which are showing higher non-premium minute growth rates.[27]

24. Southwestern Bell reaffirms that its minutes were classified correctly.[28] It argues that the relatively greater growth in non-premium MOUs is to be expected, for several reasons. SWB did not make any significant equal access conversions over the period in question. In addition, SWB states, it is in the urban areas, typically served by equal access end offices, in which SWB is most vulnerable to bypass.[29] These two factors should lead to relatively faster non-premium MOU growth and relatively slower premium MOU growth. SWB also argues that, since only 3 percent of its minutes were reported as non-premium, changing the growth rate would have only a *de minimis* impact on its rate.[30]

25. US West replies that it followed the methodology outlined in the *TUF Order*, and used the minutes reported in its ARMIS Report No. 43-01.[31] In addition, it notes that its growth rate in total minutes reported in the TUF is also consistent with its growth rate for the first nine months of 1989 over the first nine months of 1988.

3. *Discussion*

26. The *TUF Order* recognized that growth in CL demand would have an effect on CCL rates. That Order therefore adopted a method for estimating growth in CL demand that would provide a consistent, reasonably accurate adjustment to CL rates and would also allow filing simplicity.[32] LECs were permitted to use the growth rate in CCL MOU for the first six months of 1989 over 1988 as an unbiased basis for estimating the changes which might be reasonably expected for the first half of 1990.

27. MCI's estimate of Bell Atlantic's 1989 demand appears to be based on a simple trend line regression using only three annual data points. As MCI itself admits in its comments, Bell Atlantic computed its growth in demand using the method described in the *TUF Order*. We do not believe that the results of the simple trend line used by MCI are sufficient grounds for altering our decision to allow growth in the first half of 1989 over the first half of 1988 as an estimate of the growth in demand to be reasonably expected in the first half of 1990.

28. MCI also notes the difference in growth rates of premium and non-premium MOU across companies. GTE, Southwestern Bell, and US West attribute these differences to different demographics and rates of equal access conversion. All three companies reaffirm the correctness of their data.

29. We have found discrepancies between the growth rates reported by the companies in their TUF filings and the growth rates computable from the monthly CCL MOU reports submitted by the LECs to NECA and filed with us in CC Docket No. 87-339. We note that this monthly data provided to us by NECA has evidenced deterioration in quality since April 1, 1989. It appears in this case that the TUF data is accurate and the NECA-provided data is not. We are concerned that the quality of the MOU data that the companies provide NECA be accurate. We hope to use the NECA data in the review of annual access tariff filings. We expect to continue to work with NECA and the carriers to ensure the quality of demand data the carriers provide. Moreover, analysis of the data reported by these three companies indicates that, even if the TUF data were inaccurate, and some premium MOU were misclassified as non-premium MOU, the effect on their rates would be negligible.[33]

30. However, we do not believe that the forecasted growth rates presented in this filing by GTE, Southwestern Bell, and US West are likely to be inaccurate. We therefore deny MCI's petition to investigate these demand growth results.[34]

D. Miscellaneous Issues

1. *DEM Allocator*

31. Part 36 of the Commission's Rules, 47 C.F.R. Part 36, establishes rules for separation of state and interstate operations. Section 36.125, 47 C.F.R. § 36.125 states that, beginning January 1, 1993, Central Office Equipment (COE) Category 3 investment for study areas with 50,000 or more access lines is to be apportioned on the basis of relative dial equipment minutes of use, or DEMs.[35] The rule also establishes a transition from allocations based upon earlier procedures to a DEM allocation. Each step in that transition becomes effective at the beginning of the calendar year. The LECs were required to reflect the effect of the January 1, 1990 change in this factor in their TUF filings.

32. Ad Hoc claims that the DEM allocator forces special access customers to cross-subsidize switched TS customers. Ad Hoc Petition at 7-8.[36] No other petitioner comments on the DEM allocator as it affects the LECs' filings here. The LECs in reply state that Ad Hoc's argument is misplaced in this proceeding, and that the LECs have correctly implemented the separations rules established by the Commission.[37]

33. *Discussion*. We have examined Ad Hoc's petition and the associated replies. Ad Hoc's objections appear to relate to the Commission's Rule rather than the LECs' implementation. Ad Hoc has not presented a question that warrants investigation here.

2. *Ameritech*

34. Ad Hoc alleges that certain changes effective January 1, 1990 produced a $3.2 million special access revenue requirement reduction for Ameritech. According to Ad Hoc, Ameritech refuses to file a rate reduction because Ameritech claims it is underearning at current rates. Ad Hoc argues that the *TUF Order* requires Ameritech to submit a separate tariff transmittal with full cost support material as specified in Section 61.38 of the Commission's Rules, to verify that a rate reduction is not necessary. Ad Hoc Petition at 2-3. Allnet says Ameritech made its TUF projections assuming a pending tariff will become effective, and maintains that Ameritech's projections should not include this assumption. Allnet Petition at 2-4.[38]

35. In reply to Ad Hoc, Ameritech claims its decision not to decrease its special access rates is justified, because it reduced certain special access rates effective in September. Ameritech Reply at 14-15 (*citing* Ameritech Trans. No. 349, filed Aug. 8, 1989). In reply to Allnet, Ameritech maintains that the common industry practice is to assume in tariff filings that pending tariffs will become effective as filed. *Id.* at 8-9.[39]

36. We have released a separate Order regarding Ameritech's regionalization proposal in its Transmittal No. 373.[40] That Order denies petitions against Transmittal No. 373 and grants Ameritech's petition for waiver of our rules, allowing the transmittal to become effective on December 21, 1989. Our action in that matter renders moot the argument made by Allnet. Further, Ameritech has informed the Bureau that, while Ameritech continues to believe that its TUF filing complies with the *TUF Order*, it will nevertheless file revisions to its special access rates to implement the adjustment calculated in its TUF, effective January 1, 1990.

3. *NECA*

37. Allnet claims that the National Exchange Carrier Association (NECA) did not comply with Section 69.612(a)(1) of the Commission's Rules, requiring participants in the NECA CL pool to contribute the same proportion of the pool as they did in 1988. In other words, Allnet alleges that the percentage amount of the pool contributed by each participant should remain constant, and this has not been the case. Allnet Petition at 4-6. NECA alleges that the 1988 contributions were based on partial year data, and that Section 69.612(a)(1) requires that the contributions be determined by data from the full 1988 calendar year, and be fixed starting in 1989. NECA Reply at 1-4.

38. *Discussion*. 1988 data were in fact based on partial year data, and NECA is correct that Section 69.612(a)(1) requires that the contributions be determined by data from the full 1988 calendar year. In view of this explanation of the discrepancy alleged by Allnet, we find no reason to investigate NECA's computation.

4. NYNEX

39. Ad Hoc accuses New England Telephone (NET) of calculating rates that will produce excess special access revenues. Ad Hoc Petition at 5. Ad Hoc also alleges that NYNEX's inside wire amortization expenses are unusually high, and that some of these expenses are improperly placed in Switched-TS and Special Access rather than in CL. *Id.* at 6. MCI claims NYT's projected increase of $18.9 million for interstate depreciation requires that the rates be suspended and investigated. MCI claims NYNEX increased its rates $78 million in April 1989 to cover expected increases in depreciation expenses, but actual increases were only $72 million. MCI Petition at 6-7.

40. NYNEX asserts that Ad Hoc mistakenly claims that NET's Special Access revenue projections on page WS-1 of its TUF should match the projections on page WS-14. NYNEX claims that WS-1 displays actual annualized revenue from the second quarter of 1989, while WS-14 displays revenues for 1989 as forecasted at the beginning of the year. NYNEX Reply at 2-4. NYNEX also asserts that the apparently excessive Inside Wire costs are due to the termination of Inside Wire amortization. It also contends that the elimination of Inside Wire amortization and the operation of certain Part 69 allocators shift some expenses from CL to Switched TS and Special Access. *Id.* at 4-6. NYNEX also argues that its depreciation expenses are $58.5 million, rather than $78 million as MCI claims. It also argues that the April 1989 increase in depreciation expense only included depreciation on plant, and not growth in account balances or other changes. *Id.* at 9.

41. *Discussion.* We have examined the cost support data submitted by NYT and NET in support of these changes, and they appear to reflect correctly the various cost changes generated by the termination of inside wire amortization in Maine and New York. According to data submitted by the carrier, the overall impact of these changes on the total revenue requirement is a decrease of $2.8 million for NET and a decrease of $42.6 million for NYT.[41]

42. We have reviewed the carriers' calculations of the change in the revenue requirements in the Common Line, Switched Traffic Sensitive, and Special Access elements associated with the completion of their amortization of the inside wire investment. These calculations appear to reflect the impact of this change.[42] Moreover, Ad Hoc provided no specific support for its argument that carriers may have assigned increased cost inappropriately to the Switched Traffic Sensitive and Special Access elements because of the change in inside wire revenue requirements. We accordingly are not persuaded that the NYNEX rates warrant investigation.

5. United

43. MCI says that United is using the Jurisdictional Traffic Separations System (JTSS) accounting system to calculate Feature Group C (FGC) minutes. JTSS was developed by AT&T, and MCI contends that AT&T revised the JTSS system in a way that decreases AT&T access payments, and forces all other interexchange carriers to make up the difference. MCI Petition at 10-11.

44. United claims AT&T FGC terminating usage cannot be measured directly, but must be derived from sampled studies of originating usage. United Reply at 2. United explains that the Sampled Traffic Analysis Reporting System (STARS) system is a 5 percent sample of billed message traffic, processed monthly by the Bell Telephone Corporation (Bellcore) to prepare different network traffic reports, and says that STARS excludes AT&T's Megacom and Software Defined Network (SDN) traffic, because these services do not generate an originating message record. *Id.* at 2-3. United maintains that JTSS measures all of AT&T's FGC traffic, even if an originating message record is not generated, by measuring the terminating to originating message ratio (T/O), percent interLATA (PIL), and percent Readyline (PRL). *Id.* at 3. United alleges that STARS data can be validated only with three year old data, and that JTSS is a more current and accurate system. *Id.* at 4-5. United also rejects MCI's assertion that it did not adequately justify its use of JTSS in its November 2 filing. *Id.*

45. *Discussion.* We have examined the showing made by United in support of its use of the JTSS system, and its comparison with the STARS system. We are satisfied that United has adequately explained both the JTSS methodology and United's reasons for replacing STARS with JTSS. We are not persuaded that United's use of JTSS warrants investigation.

IV. MID-COURSE CORRECTIONS

46. Several carriers filed mid-course corrections proposing rate reductions; these revisions will become effective January 1, 1990. The filings include: Contel Transmittal No. 47 proposes a $4 million rate reduction. Contel includes revisions to CCL, switched, and special access rates. In addition, Contel adds Illinois to Contel's Central-North group. GTE Transmittal No. 550 proposes a $101 million rate reduction to retarget GTE's separations flow-through to allow GTE to earn the authorized 12 percent rate of return. Illinois Consolidated Transmittal No. 37, effective November 14, 1989, is a mid-course correction that is already in effect. By this transmittal, Illinois Consolidated reduced its local switching and special access rates. Southwestern Bell Transmittal No. 1898 proposes to merge Kansas into the rest of its rate aggregation, and to retarget its rates to earn the authorized rate of return. SWB's revisions will produce a $41 million reduction in rates. United Transmittal No. 59 proposes a $1 million reduction rate reduction. US West Transmittal No. 38 proposes reductions in switched access ($56 million), special access ($19.2 million) and CL ($1.4 million) revenue requirements.[43]

47. All of these midcourse corrections, as well as the rate changes allowed in this Order to become effective, should be used by NECA in its calculation of industry long term and transitional support payments under Section 69.612 of the Commission's Rules, 47 C.F.R. § 69.612, and by LECs that file Common Line rates.

V. ORDERING CLAUSES

48. Accordingly, IT IS ORDERED that the petitions of the Ad Hoc Telecommunication Users Committee, Allnet Communication Services, Inc., AT&T Communications, Inc., and MCI Telecommunications Company, against various local exchange carriers' update filings ARE GRANTED to the extent discussed herein, and otherwise ARE DENIED.

49. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), 201(b), 204(a), and 205 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 204(a),

and 205, the common line rate revisions filed by GTE South, Inc. (Alabama, Georgia, South Carolina, Tennessee, West Virginia); GTE North, Inc. (Illinois, Indiana, Wisconsin); GTE Hawaiian Telephone Compnay, Inc.; and GTE Florida, Inc., under Transmittal No. 545 ARE SUSPENDED for five months and an investigation is instituted into the lawfulness of the above-referenced tariff revisions.

50. IT IS FURTHER ORDERED that GTE South, Inc., GTE North, Inc., GTE Hawaiian Telephone Company, Inc., and GTE Florida, Inc. SHALL BE PARTIES to this proceeding.

51. IT IS FURTHER ORDERED that GTE South, Inc., GTE North, Inc., GTE Hawaiian Telephone Company, Inc., and GTE Florida, Inc. SHALL FILE a supplement reflecting the above suspension.

52. IT IS FURTHER ORDERED that the tariffs of the Bell Atlantic Telephone Companies (Virginia), Southwestern Bell Telephone Company, Inc., and GTE North, Inc., (except common line rates in Illinois, Indiana, and Wisconsin) as they relate to depreciation expenses ARE REJECTED.

53. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies (Virginia), Southwestern Bell Telephone Company, Inc., and GTE North, Inc. SHALL FILE revised rates reflecting the reduction indicated in paragraphs 16-17, *supra*, and Attachment C. In the case of GTE North, Inc., the revised rates shall not include the Common Line rates suspended in para. 53, *supra*.

54. IT IS FURTHER ORDERED that US West Communications SHALL FILE tariff revisions to advance the effective date of those revisions filed under Transmittal No. 38 from January 11, 1990, to January 1, 1990. These revisions shall be filed at the same time as any other revisions required by this Order.

55. IT IS FURTHER ORDERED that the local exchange carriers SHALL FILE tariff revisions indicated herein on December 28, 1989, with a scheduled effective date of January 1, 1990. For this purpose, we assign Special Permission No. 89-979 and waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58 and 61.59.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Access Tariff Filings Schedules, CC Docket No. 88-326, 3 FCC Rcd 5495 (1988) (*Access Schedule Order*).

[2] Commission Requirements for Cost Support Material To Be Filed with 1989 Annual Access Tariffs, 4 FCC Rcd 1662 (Com.Car.Bur. 1988).

[3] Commission Requirements for Cost Support Material To Be Filed with January 1, 1990, Access Tariff Revisions, Order, 4 FCC Rcd 6773 (Com.Car.Bur. 1989) (*TUF Order*).

[4] The *TUF Order* notes that this simplification of cost support is appropriate because these tariff filings will be in effect for only six months; because the filings modify rates which received careful review; and because the baseline of available data is short -- only three to five months, in view of rule changes that altered cost calculations effective April 1, 1989. 4 FCC Rcd at 6773.

[5] In response to the *TUF Order*, Alltel, Ameritech, Contel, NECA, NYNEX, SNET, Southwestern, US West, and United filed waiver requests. American Telephone and Telegraph Company (AT&T) and MCI Communications Corporation (MCI) filed oppositions. These waiver requests were in most cases granted in a *Waiver Order* released September 29, 1989. Commission Requirements for Cost Support Material To Be Filed with January 1, 1990, Access Tariff Revisions, Memorandum Opinion and Order, 4 FCC Rcd 7204 (Com.Car.Bur. 1989) (*Waiver Order*).

[6] Some of these mid-course corrections are discussed in the instant Order. Others -- the filings of NET, Rochester, Roseville, and Centel -- will be addressed separately.

[7] The *TUF Order* noted that LECs were free to submit other changes in access rates, but that changes based on factors not included in this list should be submitted in separate transmittals, and were subject to the usual requirements of Section 61.38 of the Commission's Rules. *TUF Order*, 4 FCC Rcd at 6774.

[8] The four investment categories are long term or transitional support (LTS or TRS), customer premises equipment (CPE), inside wire, and pay telephone investment or expenses. *See* Section 69.501(e) of the Commission's Rules, 47 C.F.R. § 69.501(e).

[9] Using mean growth rate of 3 percent in BFP revenue requirements per subscriber line for all Tier 1 LECs, and a standard deviation per line in BFP costs of 5.1 percent, AT&T developed a "benchmark" growth rate of one standard deviation above the mean, or 8.1 percent.

[10] The 20 LECs are as follows: Ameritech (Ohio); Cincinnati Bell (Ohio); GTE (Alabama, Florida, Georgia, Hawaii, Iowa, Illinois, Indiana, Michigan, Missouri, Ohio, South Carolina, Tennessee, Wisconsin, and West Virginia); NYNEX (Massachusetts); and US West (Arizona, New Mexico, and Idaho). AT&T Petition, Appendix A at 8.

[11] Annual 1989 Access Tariff Filings, Memorandum Opinion and Order, 4 FCC Rcd 3638 (Com.Car.Bur. 1989) (*1989 Access Order*).

Ameritech, Cincinnati Bell, and US West claim that AT&T's test for determining excessive BFP is flawed, because that test ignores the variation among LECs in number of access lines served, age and type of switches employed, and economic conditions of geographic service areas. Ameritech Reply at 5; Cincinnati Bell Reply at 2; US West Reply at 4-7. Ameritech also argues that AT&T's cross-sectional analysis for calculating growth in BFP revenue requirements is not consistent with the Commission's formula, because the Commission's test does not focus on the revenue requirement for one separated element as AT&T's test does. Ameritech Reply at 4-5, 6. NYNEX argues that the cross-sectional analysis that the Common Carrier Bureau used in our *1989 Access Order* was designed to test the reasonableness of forecasts, not actual costs. NYNEX Reply at 7. GTE contends that AT&T's BFP test is based on an erroneous assumption that there should be a correlation between CL costs and demand. GTE Reply at 2-3 (*quoting TUF Order*, 4 FCC Rcd at 6774 ("there is no reason to expect a stable relationship between CL costs and demand")).

[12] Cincinnati Bell and GTE maintain that their high BFP costs are justified because of new construction programs. Cincinnati Bell Reply at 2-5; GTE Reply at 3-4. Ameritech asserts that it should be allowed to average Ohio Bell's BFP growth with the BFP growth of the other LECs in Ameritech's region,

and that its average BFP growth is 2.3 percent. Ameritech Reply at 7. Ameritech also claims that reducing Ohio Bell's revenue requirement by the amount suggested by AT&T will not affect Ameritech's regionally averaged end user common line (EUCL) rates. *Id.* at 7-8 and Ex. 2.

[13] We do not, however, dismiss any of the arguments raised in petitions on the grounds that we prescribed a specific methodology or set of rates for any part of the TUF filing. The *TUF Order* expressly gave carriers the option of basing their access tariff revisions in the TUF format or other cost support data that complies with Section 61.38 of the Commission's Rules. *TUF Order*, 4 FCC Rcd at 6774. This allowance of a particular simplified method does not constitute a prescription of rates nor of a rate-setting methodology. Moreover, the LECs remained free to adjust their rates, based upon other factors, in separate transmittals. Our decision to deny requests for rejection, suspension, or investigation would not, of course, insulate LECs from liability in a Section 208 proceeding if these methods in fact produce excessive returns.

[14] *See* Attachment B. Each GTOC tariff entity that includes one or more of these study areas also proposes an increase in its CCL rates.

[15] The GTOC study areas whose BFP growth rates exceed 13 percent are Alabama, Georgia, South Carolina, Tennessee, West Virginia, Illinois, Indiana, Wisconsin, Hawaii, and Florida.

[16] *See generally* Annual 1987 Access Tariff Filings, 2 FCC Rcd 866, 873 (Com.Car.Bur. 1986).

[17] Ameritech and US West claim that the *1989 Access Order* requested the LECs to estimate the effects of certain changes scheduled to occur in 1990, and this included depreciation rates for PNB. US West Reply at 7-8; Ameritech Reply at 12-13 (*quoting 1989 Access Order*, 4 FCC Rcd at 3654).

[18] US West argues that its revision, too, is more immediate, in that the decision on its depreciation rates will be made in the week of January 22, 1990, rather than June as MCI asserts. US West Reply at 8.

[19] Ameritech asserts that Wisconsin Bell's depreciation rates were developed during a series of negotiations between Ameritech and the Commission starting in January 1989. Ameritech Reply at 12-13. BellSouth and Southwestern Bell state that they proposed new depreciation rates in August and September of 1989, and these rates are scheduled to become effective in January 1990. BellSouth Reply at 3, Southwestern Bell Reply at 5 (*citing* Depreciation Rate Prescriptions Proposed for Domestic Telephone Carriers, 4 FCC Rcd 6263 (Com.Car.Bur. 1989) (*Depreciation Prescription Public Notice)*). BellSouth argues, in addition, that the Accounting and Audits Division of the Common Carrier Bureau has approved Southern Bell's depreciation rates on an interim basis. BellSouth Reply at 3.

[20] Other LECs against whom petitions were filed in this matter appear to have used rates equal to or lower than the composite depreciation rate of the carriers reviewed in 1989.

[21] Attachment D demonstrates the distribution by GTE North of its disallowance among the affected companies.

[22] *See* Section 69.205 of the Commission's Rules, 47 C.F.R. § 69.205.

[23] *See* Section 69.206 of the Commission's Rules, 47 C.F.R. § 69.206.

[24] Bell Atlantic Reply at 4.

[25] *Id.* at 5-6.

[26] GTE Reply at 4.

[27] *Id.* at 5, and Exhibit I.

[28] SWB Reply at 7.

[29] *Id.* at 8.

[30] *Id.*

[31] US West Reply at 3.

[32] *TUF Order*, 4 FCC Rcd at 6774.

[33] For example, if all the growth in non-premium terminating MOU is subtracted from non-premium MOU and added to premium terminating MOU, the resulting change in chargeable MOU is less than four tenths of one percent for each of these companies. The effect on the rates of this small change in chargeable MOU should be negligible.

[34] Our decision to deny that petition does not, of course, affect the rights of MCI or any other access customer in any subsequent Section 208 proceeding.

[35] DEMs are defined as the minutes of holding time of the originating and terminating local switching equipment, as holding time is defined in the Glossary of the Rules.

[36] According to Ad Hoc, the DEM allocator reduces the interstate allocation of local switching investment without a corresponding change in special access investment, artificially inflating special access investment and revenue requirement. Ad Hoc Petition at 7. Ad Hoc petitions the Bureau to investigate the possibility of reallocating some cost increases from special access to switched traffic sensitive elements. *Id.* at 8.

[37] Ameritech and US West contend that the shift in costs noted by Ad Hoc occurs in any change in allocators, and is not a sign of a fundamental flaw. Ameritech Reply at 16-17; US West Reply at 8-10. BellSouth and US West contend that any change in the DEM allocator should be made in a separate Rule Making proceeding. BellSouth Reply at 1-2; US West Reply at 10. Southwestern Bell argues that Ad Hoc mistakenly used Part 36 allocators, designed for allocation of costs between interstate and intrastate jurisdictions, rather than Part 69 allocators designed to allocate costs among access elements. Southwestern Bell Reply at 9. Southwestern Bell also alleges that its cost increases are moderate if the Part 69 allocators are used. *Id.* at 10.

[38] Allnet refers to Ameritech's Transmittal No. 373.

[39] Ameritech also contends that Allnet's approach would require carriers to file tariffs in the alternative, and that this would create administrative difficulties. Ameritech Reply at 8-9.

[40] Ameritech Operating Companies Transmittal No. 373, Order, DA 89-1641, released Dec. 20, 1989.

[41] Updated TUF WS 7.3 Row 100, Column (j), New England Telephone Company; Updated TUF WS 7.3 Row 100, Column (j) New York Telephone Company.

[42] As a part of our analysis we compared the assignment of General Support Facilities (GSF) to the various access elements in the 1988 ARMIS Access Report, FCC Report 43-04, for these study areas, and the effect after we eliminated the inside wire investment that was completely amortized in 1989. We found that the distribution was close to the distribution of GSF submitted by NYNEX in its worksheets submitted November 2, 1989, with the TUFs. The minor differences we found in the assignment of GSF could have been generated by changes in the 1989 distribution of investment in Central Office Equipment (COE), Cable and Wireless Facilities (C&WF) and Information Origination/Termination (IOT).

[43] We note that US West is being directed to advance the effective date of its Transmittal No. 38 from January 11, 1990, to January 1, 1990. *See* infra.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

JACKSON CELLULAR TELEPHONE CO., INC., Assignor, — File No. 02459-CL-AL-1-89

and

JACKSON CELLULAR PARTNERSHIP, Assignee

For Consent to Assign the License of Domestic Public Cellular Radio Telecommunications Service Station KNKA685 in Modesto, California

and

JACKSON CELLULAR PARTNERSHIP, Assignor, — File No. 02460-CL-AL-1-89

and

JACKSON CELLULAR TELEPHONE CO., INC, Assignee

For Consent to Assign the License of Domestic Public Cellular Radio Telecommunications Service Station KNKA799 in Jackson, Mississippi

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 1989; Released: January 5, 1990

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. On February 13, 1989, Cellucal, Inc., Cell Cal-II, GBBV Investment Company, Giselle V. Laurmann, Barclay R. Goodwin, Jr., Robert Morelli, Neoteric Communications Group, Ramcell, Inc., R.H. Associates, Tricel Group, and Port Services Company ("Minority Cellular Partners") filed petitions to deny the above-captioned applications of Jackson Cellular Partnership ("Jackson") and Jackson Cellular Telephone Co., Inc. ("Jackson Telephone") for assignment of the non-wireline license of Domestic Public Cellular Radio Station KNKA799 in the Jackson, Mississippi Metropolitan Statistical Area (MSA) from Jackson to Jackson Telephone; and for assignment of the non-wireline license of Domestic Public Cellular Radio Station KNKA685 in the Modesto, California MSA from Jackson Telephone to Jackson.[1] Jackson and Jackson Telephone filed Oppositions to the petitions. On August 18, 1989, Minority Cellular Partners filed a supplement to their petitions to deny and an informal opposition to the supplemental pleading was filed by Jackson and Jackson Telephone.

II. BACKGROUND AND CONTENTIONS OF THE PARTIES

2. On December 14, 1988, Jackson, a wholly owned subsidiary of McCaw Cellular Communications, Inc. and Jackson Telephone, controlled by Celutel, Inc., filed the above-captioned applications for consent to the assignment of the Jackson and Modesto cellular authorizations. Pursuant to the proposed assignment, Jackson would swap the authorization for the Jackson system in exchange for the Modesto system currently held by Jackson Telephone.

3. In their petitions to deny, the Minority Cellular Partners argue that (1) the proposed assignments would violate the Commission's anti-trafficking rules[2] and (2) that Jackson and Jackson Telephone have breached their contractual and fiduciary duties to the Minority Cellular Partners which individually hold or have held ownership interests in Jackson Telephone, the permittee of the Modesto system.

4. In Opposition, Jackson and Jackson Telephone assert that the Commission's anti-trafficking rules do not apply to the proposed swap of cellular authorizations because the proposed exchange falls within a specific exception to these rules. Moreover, applicants argue that the proposed swap will effectuate substantial operating efficiencies and economies of scale in the Modesto and Jackson systems and promote efficient provision of cellular services to the public. In response to petitioners' second allegation concerning a breach of contract and fiduciary duties, applicants assert that the Commission does not consider such private disputes in acting on assignment applications.

III. DISCUSSION

5. Section 22.920(b)(1) of the Commission's Rules specifically exempts from the anti-trafficking provisions of Section 22.40 of the Rules: "[T]he trading of an ownership interest in a construction permit for a cellular system in one market for a commensurate interest in another cellular market." The Commission, in *Cellular Lottery Rule Making*, 98 FCC 2d 175, 217 n.113 (1984), carved out the exceptions to Section 22.40 in order to "facilitate the orderly construction and development of cellular systems by allowing the consolidation of ownership and management into an effective entrepreneurial structure, while continuing to discourage insincere applicants." Applicants have demonstrated that the proposed exchange represents a trade of an ownership interest in one cellular system in one market for a commensurate interest in another cellular market. [3] Moreover, contrary to petitioners' assertion that Jackson Telephone had no intention of developing the Modesto system,[4] that system has been constructed and is currently operating, as is the Jackson

system.[5] Accordingly, the exchange herein is not subject to the anti-trafficking rules. Therefore, petitioners' allegations concerning trafficking are therefore rejected.

6. Equally unavailing is petitioners' second argument requesting the Commission to deny the applications for assignment based upon allegations of a breach of contract and fiduciary duties memorialized in a partnership agreement. The Commission has consistently refused to allow aggrieved minority owners to prevent the assignment of facilities based on grounds of an alleged breach of fiduciary duty or monetary harm. *Sonderling Broadcasting Co.*, 46 Rad. Reg. 2d (P & F) 890, 894 (1979), *see also Robert J. Kile*, 3 FCC Rcd 1087 (Mob. Ser. Div. 1988), *app. for rev. pending*. Moreover, such claims are considered matters of private dispute and must be satisfied in a local court or other appropriate forum. *John R. Kingsbery*, 71 FCC 2d 1173, 1174 (1979), *Rodney A. McDaniel*, 4 FCC Rcd 1736 (1989).

IV. CONCLUSION AND ORDERING PARAGRAPHS

7. In view of the foregoing, we find that a grant of the pending applications for assignment, which will result in an exchange of the Jackson and Modesto authorizations, would be in the public interest and promote efficient provision of cellular services to the public.

8. Therefore, IT IS ORDERED, that the application for assignment of the non-wireline cellular authorization for Modesto, California from Jackson Cellular Telephone Co., Inc. to Jackson Cellular Partnership and the application for assignment of the non-wireline cellular authorization for Jackson, Mississippi from Jackson Cellular Partnership to Jackson Cellular Telephone Co., Inc. ARE GRANTED.

9. IT IS FURTHER ORDERED, that the petitions to deny filed by the Minority Cellular Partners against the above-captioned applications ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] On February 13, 1989, a petition to deny the applications for assignment of the above-captioned non-wireline cellular licenses was filed by Brian E. Boyle ("Boyle"), an individual, minority cellular partner in the Modesto system. Oppositions were filed by the applicants and a reply was filed by the petitioner. In his petition, Boyle made essentially the same allegations as were made by the Minority Cellular Partners. On November 7, 1989, Boyle filed a motion to dismiss his petition to deny, and his petition is hereby dismissed.

[2] Section 22.40 of the Commission's Rules states, in pertinent part, that:

> (a) The Commission will review a proposed transaction to determine if the circumstances indicate "trafficking" in licenses or construction permits whenever applications (except those involving *pro forma* assignment or transfer of control and those for exclusive paging frequencies) for consent to assignment of a common carrier authorization, or for transfer of control of a permittee or licensee, involve facilities that were:
>
> (1) Authorized following a comparative hearing and have been operated less than one year, or;
>
> (2) Involve facilities that have not been constructed. . . .

[3] Opposition of Jackson Telephone at 7.

[4] *See* Modesto Petition at 7.

[5] Minority Cellular Partners have presented absolutely no evidence that either transferor was an insincere applicant for an initial cellular license.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALASCOM, INC. File Nos. C4-89-003-P/L
I-T-C-89-115

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, and Part 23 of the Commission's Rules to construct and operate facilities for the provision of communications services between Gambell, Alaska and Provideniya, Magadan, Union of Soviet Socialist Republics

ORDER AND AUTHORIZATION

Adopted: December 27, 1989; Released: January 5, 1990

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications filed by Alascom, Inc., requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, and Part 23 of the Commission's Rules to construct and operate international fixed public radiocommunications facilities between Gambell, Alaska and Provideniya, Magadan, Union of Soviet Socialist Republics (U.S.S.R.) to establish up to 12 two-way circuits. The applications were placed on the Commission's public notice and no comments were received.

2. In its application, Alascom seeks authority to establish a UHF radio-based link between Gambell and Provideniya, a path of approximately 62.78 miles across the Bering Strait. In Gambell, the station will be located at coordinates (63^0 46' 42" North Latitude - 171^0 43' 35" West Longitude) and situated on the property of the local telephone company, United Utilities, Inc. The system will consist of a Granger Association model 6004-1A/12 UHF Terminal in the "Hot Stand-By" Mode. The radios will transmit on 454.64 MHz with 200KF9W emissions using a Granger Association UHF power amplifier with a maximum output power of 40 watts into a 15 foot diameter Mark Products Model P-4180GR grid type parabolic dish.[1] The antenna shall be side mounted on a 120' tower (132' AMSL) such that the maximum height of the antenna does not exceed 85' above the ground and the tower shall be marked and lighted in accordance with paragraphs 1, 2, and 22 of FCC Form 715.

3. The system will use a Lenkurt 46A3-SC multiplex to interface the radio system to the California Microwave, Inc., satellite earth station equipment. The Gambell earth station connects with the Alascom telephone network via Alascom's Aurora I satellite at Alascom's Gilmore Creek earth station near Fairbanks, Alaska. In the U.S.S.R., the station will be located at coordinates (64^0 21' 46" North Latitude - 173^0 18' 40" West Longitude) and situated on an existing communication site in the mountains near Provideniya. The tower and equipment shelter will be supplied and the installation, operation and maintenance performed by the Magadan Territorial Board of Communication. Alascom will own and supply all transmitting and receiving equipment, including the equipment to be installed in the U.S.S.R.[2]

4. The facilities will be operated as part of Alascom's international communications service offerings, providing international message telecommunications service (IMTS), private line and data services. Alascom claims that the link would be the first direct, terrestrial connection between Alaska and the U.S.S.R., interconnecting Alascom's Gambell, Alaska earth station to Soviet facilities near Magadan. Alascom notes that a direct link is important in light of the strong community of interest between Alaskans and residents of the Soviet Far East, including close family ties among native populations. Presently, telephone contact between Alaska and the Soviet Far East and adjacent areas may only be accomplished by going thousands of miles around the world. Alascom states that the present arrangement is grossly inefficient. Alascom submits that the proposed system reflects the most cost effective means to interconnect the Soviet Far East and Alaska. In this regard, Alascom cites the low incremental cost of adding this link to its state-wide telecommunications network, which includes terrestrial facilities, the Aurora I satellite and over 200 earth stations.

5. In support of its request, Alascom has furnished a letter from the United States Department of State supporting the establishment of the proposed interconnection.[3] The State Department noted that initiation of such service would be contingent, *inter alia*, upon satisfaction of any Coordination Committee on Export Control (COCOM) requirements, coordination with the Department of Commerce and approval of a license application by this Commission. Alascom has also included a copy of a Protocol of Collaboration between Alascom and the Magadan Territorial Board of Communications setting forth their intent to effectuate the proposed arrangement.

6. In view of the above considerations, we find that a grant of Alascom's applications to construct and operate a UHF radio-based telecommunications link to establish up to 12 two-way circuits between Provideniya, Magadan, U.S.S.R. and its facilities located at Gambell, Alaska, would serve the public convenience and necessity. As Alascom points out, the proposed direct link is more efficient than the current method of providing service, and the link can be provided at a low incremental cost. In addition, the State Department has given its approval to the establishment of the proposed link subject to certain conditions. We will therefore, authorize the construction and operation of the proposed facilities subject to the conditions set forth in the State Department's April 3, 1989 letter.

7. Accordingly, the applications of Alascom Inc., File Nos. I-T-C-89-115 and C4-89-003-P/L, ARE GRANTED and Alascom is authorized to:

a) construct a radio-based telecommunications link between Provideniya, Magadan U.S.S.R. and Alascom's facilities located at Gambell, Alaska operating in the 450-460 MHz frequency band; and

b) operate said facilities to establish up to 12 two-way channels of communications to provide IMTS, private line and data services between the U.S. and the U.S.S.R.

8. IT IS FURTHER ORDERED that this authorization is subject to Alascom's satisfaction of any COCOM requirements and coordination with the Department of Commerce.

9. IT IS FURTHER ORDERED that this authorization is subject to further coordination with the U.S.S.R., must be re-coordinated with Mobile Services Division every 10 years at the time of renewal, and shall not cause any harmful interference to stations operating in accordance with the Table of Frequency Allocations.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In an order released October 5, 1989, the Commission granted Alascom's request for a waiver of Section 2.106 of the Commission's Rules to establish the subject communications link in the 450-460 MHz frequency band. This frequency band is allocated domestically to the land mobile service. The Commission noted that it is extremely unlikely that any other users of the spectrum will be affected by Alascom's operation in this frequency band due to the orientation of the link over water and the desolate environment. *See* Alascom, Inc., 4 FCC Rcd 7182 (1989).

[2] Alascom plans to transfer the equipment to the U.S.S.R. at net book value, although the terms of the transfer are subject to negotiation.

[3] Letter from Parker W. Borg, U.S. Deputy Coordinator, Bureau of International Communications and Information Policy, Department of State to Charles R. Naftalin, Attorney for Alascom, Inc. (April 3, 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PUERTO RICO TELEPHONE COMPANY — File No. I-T-C-89-085

For Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Capacity in the Transcaribbean Cable System

PUERTO RICO TELEPHONE COMPANY — File No. SCL-89-003

Application to Amend the Submarine Cable Landing License for the Transcaribbean Cable System to add Puerto Rico Telephone Company as a Licensee

TELEFONICA LARGA DISTANCIA DE PUERTO RICO — File No. I-T-C-89-145

For Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Capacity in the Transcaribbean Cable System

TELEFONICA LARGA DISTANCIA DE PUERTO RICO — File No. SCL-89-008

Application to Amend the USISCs Submarine Cable Landing License for the Transcaribbean Cable System to add Telefonica Larga Distancia de Puerto Rico as a Licensee

ORDER AND AUTHORIZATION

Adopted: December 27, 1989; Released: January 5, 1990

By the Chief, International Facilities Division:

1. On March 16, 1989, Puerto Rico Telephone Company (PRTC) filed an application requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire, operate and activate capacity in the Transcaribbean Cable System (TCS-1) to provide private line service between Puerto Rico and the U.S. Mainland (File No. I-T-C-89-085). On July 25, 1989, Telefonica Larga Distancia de Puerto Rico (TLD) filed an application requesting similar authority to acquire TCS-1 capacity to provide message telecommunications service between Puerto Rico and the Dominican Republic, Colombia, Jamaica and Haiti (File No. I-T-C-89-145). Concurrent with their Section 214 applications, both PRTC and TLD filed applications to amend the TCS-1 submarine cable landing license held by the United States international service carriers (USISCs)[1] to be added as licensees (File Nos. S-C-L-89-003 and S-C-L-89-008). The applications were placed on public notice. American Telephone and Telegraph Company (AT&T) and AT&T of Puerto Rico (AT&T-PR) filed comments with regard to the applications of PRTC.

2. PRTC is a corporation organized and operating under the laws of Delaware. PRTC is owned by the Puerto Rico Telephone Authority (PRTA), a public authority created by the Government of the Commonwealth of Puerto Rico. TLD is a corporation organized and operating under the laws of the Commonwealth of Puerto Rico. TLD is also owned by PRTA as a subsidiary to provide interstate and international message telecommunications service (IMTS) between Puerto Rico and several off-island locations. TLD has been classified as non-dominant in the provision of its off-island services.[2]

3. PRTC seeks authority to acquire and operate up to 990 Minimum Assignable Units of Ownership (MAUOs) in the Segment F (Florida-Puerto Rico) of the TCS-1 cable system to provide domestic private line services between Puerto Rico and Florida. [3] Pursuant to an agreement with AT&T, PRTC states that it will acquire MAUOs formerly assigned to AT&T under the C&MA for TCS-1. PRTC estimates that its cost for 990 MAUOs will be $10.5 million. PRTC states that it is already providing private line services between Puerto Rico and the U.S. Mainland in conjunction with American Satellite Company (Contel ASC) through satellite earth stations located at Humacao, Campo Rico, Caguas, Las Piedras, Carolina and Manati, Puerto Rico. PRTC states that its participation in the Florida-Puerto Rico segment of TCS-1 will allow it to meet increased demand for private line service. PRTC also states that the provision of additional circuits to be used for off-island telecommunications service will enhance competition.

4. TLD seeks authority to acquire, operate and activate up to 91 half MAUOs in Segment G of the TCS-1 cable and to lease such connecting facilities as necessary to provide IMTS between Puerto Rico and the Dominican Republic, Jamaica, Colombia and Haiti. The 91 half MAUOs will be used in the following manner: 30 half MAUOs for service between Puerto Rico and the Dominican Republic, 31 half MAUOs for service between Puerto Rico and Colombia, 18 half MAUOs for service between Puerto Rico and Jamaica and 12 half MAUOs for service between Puerto Rico and Haiti. In addition, TLD requests authority to acquire by lease necessary connecting facilities to extend TCS-1 capacity to Haiti. TLD states that it will separately request authority to activate capacity for its services to Haiti when it has completed arrangements with its correspondents in Haiti. Pursuant to an agreement with AT&T, TLD will acquire MAUOs formerly assigned to AT&T under the C&MA for TCS-1. TLD has no existing facilities between Puerto Rico and Colombia, Jamaica and Haiti. However, TLD does have a point-to-point microwave radio system between Monte del Estado, Puerto Rico and Otra Banda, Dominican Republic providing 672 channels between these points and TLD is authorized to

provide IMTS service to Colombia and the Dominican Republic. Participation by TLD in TCS-1 will allow TLD to meet increased demand in the markets serviced by TCS-1. TLD estimates that the cost for the requested capacity will be approximately $.94 million which represents approximately one percent of the cost of the TCS-1 cable system ($133.5 million).

5. PRTC and TLD also seek to modify the existing cable landing licenses by adding themselves as licensees of the cable system. On October 24, 1989, the TCS-1 owners voted to amend the C&MA to add PRTC and TLD as owners, contingent upon PRTC and TLD receiving Commission authorization.[4]

6. AT&T/AT&T-PR filed comments in response to PRTC's application. They do not oppose the grant of capacity in TCS-1 to PRTC, but seek to ensure adherence to the rules the Commission has established for Puerto Rico off-island services. AT&T/AT&T-PR note that PRTC's applications do not state whether it has complied with the conditions imposed on it by CC Docket No. 86-309,[5] the Rule Making proceeding which developed policies concerning applications for facilities to provide common carrier services between Puerto Rico and off-island points. AT&T/AT&T-PR point out that those conditions were not affected by the Commission's declaratory ruling that TLD would be non-dominant in the provision of off-island message telephone service.[6] Thus, AT&T/AT&T-PR ask that the Commission be mindful of the representations made by PRTA and the conditions established in CC Docket No. 86-309. Further, AT&T and AT&T-PR state they are confused as to whether PRTC or its affiliate TLD is the proper applicant. AT&T/AT&T-PR note that discussions with representatives of the Puerto Rican entity indicated that the TCS-1 capacity was to be acquired by TLD for off-island message telecommunications service.

7. In its reply comments, PRTC explains that it seeks capacity in the portion of TCS-1 linking Florida to Puerto Rico and that its request pursuant to Section 214 is to provide private line services only. PRTC states there is nothing improper about its application for off-island private line authority and views the expectation by AT&T/AT&T-PR that the applicant would be TLD as both unfounded and irrelevant. PRTC states that there is no legitimate basis for PRTC to be required in this application to state whether it has complied with the conditions imposed on in CC Docket No. 86-309 because that proceeding dealt with IMTS, not private line services. PRTC states that the Commission did not propose or adopt any conditions on PRTC's provision of off-island private line services like those imposed on PRTC's provision of off-island IMTS. PRTC adds that it has been authorized to provide private line services to the United States Mainland without any special conditions since 1983. PRTC states that AT&T/AT&T-PR offer no justification for treating PRTC's application to provide private line services between Puerto Rico and Florida different from PRTC's Humacao application. PRTC states further that it is complying with the conditions imposed by CC Docket 86-309, even though it is no longer proposing to provide off-island IMTS.

8. After consideration of the requests of PRTC and TLD, we find that grant of their applications will serve the public interest. The request of PRTC is based on its desire to meet increased demand for private line service and merely supplements authority previously granted to PRTC for private line service between the Puerto Rico and the U.S. Mainland. With respect to TLD's request, the Commission has previously found that competition in the off-island IMTS markets is reasonably feasible and TLD's provision of IMTS between Puerto Rico and various off-island locations has been found to be in the public interest.[7] Thus, grant of the subject PRTC and TLD applications is consistent with those findings and is fully supported by the record here. In light of these considerations, we also find that the public interest will be served by amending the TCS-1 cable landing license to add PRTC and TLD as owners. In addition, grant of the instant applications will promote the vital interests of the American people in international communications and competitiveness.

9. The comments filed by AT&T and AT&T-PR do not alter our conclusion that grant of the instant applications will serve the public interest. With respect to the conditions imposed in connection with CC Docket No. 86-309, we are mindful of those conditions and are monitoring PRTC's compliance with them. PRTC has also stated in response to AT&T's comments that it is complying with those conditions. Moreover, AT&T has not pointed to any specfic instance of PRTC's failure to comply with those conditions.

10. We also find that PRTC is a proper applicant to provide off-island private line service. In discussing the scope of PRTC's existing services, the *Report and Order* in CC Docket No. 86-309 notes that in addition to local and intra-island telephone service, " . . . PRTC also provides private line service between Puerto Rico and the U.S. mainland . . . in conjunction with the American Satellite Company, through a general purpose earth station and several dedicated earth stations."[8] Thus, the Commission specifically recognized that PRTC was providing off-island private line service at the time it was setting forth conditions for PRTC's entry into the off-island message telephone market. Nothing in the *Report and Order* in any way limited PRTC's provision of off-island private line service.

11. Accordingly, IT IS ORDERED that the applications of PRTC, File Nos. I-T-C-89-085 and SCL-89-003, and TLD, File Nos. I-T-C-89-145 and SCL-89-008, ARE GRANTED and:

a. PRTC is authorized to acquire 990 whole MAUOS in Segment F of TCS-1 for the provision of domestic private line service between the island of Puerto Rico and the U.S. Mainland;

b. TLD is authorized to acquire and operate a 91 half MAUOs in Segment G of TCS-1: 30 half MAUOs for service between Puerto Rico and the Dominican Republic; 31 half MAUOs for service between Puerto Rico and Colombia; 18 half MAUOs for service between Puerto Rico and Jamaica; and 12 half MAUOs for service between Puerto Rico and Haiti;

c. The cable landing license for the TCS-1 cable system (File No. S-C-L-88-001) is amened to include PRTC and TLD as owners and licensees of the TCS-1 cable system under the provisions of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. Sections

34-39 and Executive Order 10530, 3 C.F.R. 1954-1958 (Comp., p 189 (1961) *reprinted in* 3 U.S.C.A. Section 301 at 1052 (1985).

12. IT IS FURTHER ORDERED that TLD is authorized to acquire by lease such connecting facilities as may be required to extend its capacity in TCS-1 to Haiti.

13. IT IS FURTHER ORDERED that PRTC's service over Segment F of TCS-1 is limited to domestic private line facilities between Puerto Rico and the United States Mainland and PRTC's facilities shall not be connected to Segment G of TCS-1 for the provision of international capacity.

14. IT IS FURTHER ORDERED that AT&T shall file with the Commission all necessary amendments and adjustments to the C&MA as required by the authorization herein to PRTC and TLD.

15. IT IS FURTHER ORDERED that AT&T is authorized to conform the assignment of capacity in the TCS-1 cable system as summarized herein.

16. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In a decision adopted on September 14, 1988 the Commission found that the construction and operation of the digital optical fiber TCS-1 cable system would serve the public interest. The cable system will land in the United States in the vicinities of West Palm Beach, Florida and in San Juan, Puerto Rico. The cable will then continue and land in the vicinities of Santo Domingo, the Dominican Republic, Kingston, Jamaica and Barranquilla, Colombia. The U.S. owners of TCS-1 are AT&T, AT&T-PR, MCI International, Inc., RCA Global Communications, Inc., U.S. Sprint Communications Company and WU World Communications, Inc. (now World Communications, Inc.). The TCS-1 Construction and Maintenance Agreement (C&MA) provides for additional acquisition of capacity on an indefeasible right of user (IRU), lease or other mutually agreed upon basis subject to Commission authorization. The C&MA also permits new carriers to obtain TCS-1 capacity on an ownership basis through March 31, 1990, the date of the provisional acceptance of TCS-1. The international portion of TCS-1 may be used by U.S. carriers for the provision of domestic service between the United States Mainland and Puerto Rico once capacity has been ceded from the Florico-2 cable by AT&T. *See* American Telephone and Telegraph Company, *et al.*, 3 FCC Rcd 6073 (1988).

[2] *See* Puerto Rico Telephone Authority, 3 FCC Rcd 5675 (1988).

[3] Initially there was some question as to how PRTC's request for TCS-1 capacity would be satisfied. As noted in footnote 1, *supra*, under the terms of the TCS-1 C&MA, the international portion of TCS-1 may be used by the USISCs for the provision of domestic service between the United States Mainland and Puerto Rico once capacity has been ceded from Florico-2 by AT&T. On October 12, 1989, AT&T filed a letter describing the changes in the capacity of Segment F of TCS-1 and the resultant impact on the capacity of the Florico-2 Cable System. Segment F's capacity is that portion of the 7560 MAUO design capacity of Florico-2 which has been ceded to TCS-1. Because of a reduction in the ownership interest of ITT World Communications, Inc. (ITT), the capacity in Segment F of TCS-1 was contractually lowered in the signed C&MA. ITT's ownership interest in TCS-1 capacity was subsequently transferred to WU Worldcom and is now held by World Communications, Inc. (WorldCom). The decrease in the TCS-1 capacity (to 2790 MAUOs) necessarily increased Florico-2's capacity by a like amount (to 4770 MAUOs) . According to AT&T, once PRTC receives the requisite Commission authorization, the TCS-1 capacity will again be contractually adjusted by means of a further amendment to the C&MA. In light of WorldCom's November 2, 1989 letter indicating its concurrence with AT&T's representation in this regard and the express language contained in the C&MA, there is no issue as to the availability of capacity to meet PRTC's needs. By the grant of PRTC's request, the capacity in Segment F of TCS-1 will be increased by 990 whole MAUOs to 3780 whole MAUOs, and the capacity of Florico-2 will consist of the remaining 3780 whole MAUOs.

[4] On November 3, 1989, counsel for PRTC and TLD notified the International Facilities Division by letter that on October 24, 1989, the TCS-1 owners voted to amend the C&MA to add PRTC and TLD as owners, contingent to PRTC and TLD receiving Commission authorizations.

[5] *See* Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the island of Puerto Rico, 2 FCC Rcd 6600 (1987).

[6] *See* Puerto Rico Telephone Authority, 3 FCC Rcd 5675 (1988).

[7] *See* Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico, 2 FCC Rcd at 6605; and La Telefonica Larga Distancia de Puerto Rico, 3 FCC Rcd 5937 (1988).

[8] *See* 2 FCC Rcd at 6601, n. 5.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GLOBAL COMMUNICATIONS CORPORATION — File No. I-T-C-90-006

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 27, 1989; Released: January 5, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 5, 1989 by Global Communications Corporation (Global), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on October 25, 1989. No comments were received.

2. The applicant is a non-dominant domestic resale common carrier. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Global.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-90-006 IS GRANTED, and Global is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2, and Long Distance Service of Washington, Inc.'s Tariff F.C.C. No. 1, between the United States and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-90-007

Application for authority to acquire and operate facilities for direct service between the U.S. and El Salvador.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 27, 1989; Released: January 5, 1990

By the Chief, International Facilities Division:

1. The above captioned application, filed on October 20, 1989 by MCI Telecommunications Corp. (MCI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite facilities for the provision of direct service between the U.S. and El Salvador. The application was placed on public notice on October 25, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and El Salvador by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-007 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 48 voice-grade satellite circuits between the Andover, Maine earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in El Salvador furnished by MCI's correspondent in El Salvador;

b. own and operate 48 voice-grade circuits in the Andover earth station;

c. own and operate 48 voice-grade connecting circuits between the Andover earth station and MCI's West Orange, New Jersey operating center; and

d. use said facilities to provide MCI's regularly authorized services between the U.S. and El Salvador and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in El Salvador, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERIFAX, INCORPORATED — File No. I-T-C-90-010

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 27, 1989; Released: January 5, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 10, 1989 by Amerifax, Incorporated (Amerifax), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on November 1, 1989. No comments were received.

2. The applicant proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public on a resale basis by Amerifax.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-90-010 IS GRANTED, and Amerifax is authorized to provide international switched voice services by the resale of the international switched voice services set forth in US Sprint's Tariff F.C.C. No. 1, between the United States and the points listed in that tariff.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO.

File No. I-T-C-90-012

Application for authority to establish channels of communications between the Salt Creek, California earth station and various Pacific points.

ORDER AND AUTHORIZATION

Adopted: December 27, 1989; Released: January 5, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 25, 1989 by American Telephone & Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the Salt Creek, California and INTELSAT Pacific satellites for the provision of AT&T's authorized services between the U.S. and various Pacific Ocean Region (POR) locations. The application was placed on public notice on November 1, 1989. No comments were received. Upon consideration of the application, we find that authorization of the requested services and facilities is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-012 IS GRANTED, and AT&T is authorized to establish channels of communication between the Salt Creek, California earth station and INTELSAT satellites over the Pacific Ocean for the provision of its authorized services between the U.S. and POR locations AT&T is authorized to serve, and to restore existing and planned digital fiber optic cable systems.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE COMPANY, INC.

File No. I-T-C-90-014

Application for authority to acquire and operate facilities for direct service between Hawaii and Switzerland.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 27, 1989; Released: January 5, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 10, 1989 by GTE Hawaiian Telephone Company Inc. (HTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate cable and connecting facilities for direct service between Hawaii and Switzerland. The application was placed on public notice on November 1, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct international message toll service (IMTS) between Hawaii and Switzerland by HTC.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-014 IS GRANTED, and HTC is authorized to:

a. purchase two units of digital circuit multiplication equipment;

b. lease from AT&T 2.048 Mbps capacity between Point Arena, California and Tuckerton, New Jersey;[1]

c. acquire on an IRU basis from Swiss PTT a one-half interest in and operate eight equivalent voice-grade circuits between Frankfurt, Germany and Bern, Switzerland; and

d. use said facilities, in conjunction with previously authorized facilities in the HAW-4 and TAT-8 cables, to provide HTC's authorized IMTS services between Hawaii and Switzerland.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between HTC and its correspondent in Switzerland and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] The capacity will be used to connect HTC's circuits in the HAW-4 cable with those TAT-8 circuits jointly owned by HTC and its European correspondents.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WJG MARITEL CORPORATION — File No. I-T-D-90-001

Application for authority to discontinue service at public coast station KTA-422 at Clewiston, Florida

ORDER AND AUTHORIZATION

Adopted: December 28, 1989; Released: January 5, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 2, 1989 requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, for WJG Maritel Corporation (Maritel)[1] to discontinue the Public Maritime Mobile VHF Service and otherwise terminate the operation of VHF-FM Public Local Service Coast Station KTA-422 at Clewiston, Florida. The application was placed on public notice on October 4, 1989. No comments were received.

2. Clewiston, Florida is a rural community on the western shore of Lake Okeechobee. The primary marine activity is trailored recreational boats which are launched from the launchways around the Lake. The approximate range of operations of the subject station is the entire area of Lake Okeechobee.

3. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier service to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[2]

4. Upon review of the application, we find that the public interest would be served by a grant of the application. Maritel states that it wishes to close the instant station because of minimal demand for service. The station is presently handling only three calls per month. Maritel has stations at Vero Beach, Palm Beach and Fort Meyers, Florida which will easily handle service for Lake Okeechokee.

5. Upon consideration of the application IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via the instant station.

6. Accordingly, IT IS ORDERED that application File No. I-T-D-90-001 IS GRANTED, and WJG Maritel is authorized to discontinue service via its branch coast station KTA-422 at Clewiston, Florida.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Marine Telephone Company filed the original application, but transfer of the license has been authorized and the station was transferred to WJG Maritel Corp. on September 29, 1989 and WJG Maritel Corp. was substituted as the applicant herein.

[2] Public Coast Radiotelegraph Stations, 67 FCC 2d 790 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Amendment
of Part O of the Commission's
Rules to Establish the Office
of International Communications

ORDER

Adopted: October 26, 1989; Released: January 5, 1990

By the Commission:

1. In recent years, international activities within the Commission have been handled within the operating Bureaus and Offices by separate international staffs. Several factors have prompted a reassessment of the international area: 1) Technologies and international regulatory fora have converged across traditional regulatory classifications; 2) Negotiations and trade-offs of international issues must be fully coordinated; 3) Communications policy making has become a global issue; and 4) A core international staff, rather than rotating the lead responsibility among Bureaus, will yield greater international negotiating expertise and credibility for those involved.

2. This office will not replace the existing bureaus in the execution of the various international responsibilities. Rather, the new Office of International Communications will: 1) ensure the integration of Commission international policy activities; 2) ensure that the Commission's international policies are uniform and consistent; 3) assume the principal representational role for Commission activities in international fora; and 4) serve as the focal point for international activities. The Director of International Communications will provide coordination among Bureaus with regard to development of international policy, representation of this policy and participation in international conferences. Additionally, the Director will facilitate Commission guidance of Bureau's international activities.

3. The amendments adopted herein pertain to agency organization. Therefore, the prior notice and provisions of Section 4 of the Administrative Procedures Act are inapplicable. Authority for the amendments adopted herein is contained in Sections 4(i) and 5(b) of the Communications Act of 1934, as amended.

4. In view of the foregoing, IT IS ORDERED, effective 30 days after publication in the Federal Register that Part O of the Rules and Regulations is amended as set forth below.

Part O of Chapter 1 of Title 47 of the Code of Federal Regulations is hereby amended as indicated below:

1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303 unless otherwise noted. Implement 5 U.S.C. 552, unless otherwise noted.

2. Section 0.5 is amended by revising paragraph (a)(13) to read as follows:

0.5 General description of Commission organization and operations:

(a)* * *

(13) Office of International Communications.

* * * * *

3. Section 0.51 is added to read as follows:

0.51 Functions of the Office.

The Office of International Communications has the following duties and responsibilities:

(a) Provide coordination among Bureaus and Offices with regard to development and representation of international policy and participation in international conferences.

(b) Coordinate Commission collection and dissemination of information on communications and telecommunications policy, regulatory, and market developments by other countries and international organizations.

(c) Coordinate Commission briefings on international telecommunications matters.

(d) Work with the Office of Legislative Affairs to coordinate Commission international activities on significant matters with appropriate Congressional offices.

(e) Coordinate and maintain liaison with key officials of other governments and international organizations.

(f) Advise the Chairman and Commissioners on international policy matters.

(g) Advise the Commission on the adequacy of Commission actions to promote the vital interest of the American public in commerce, defense and foreign policy.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

County of San Bernardino
Licensee of Stations
WNNB562/579

ORDER

Adopted: December 28, 1989; Released: January 5, 1990

By the Chief, Private Radio Bureau:

1. On August 7, 1989, the American SMR Network Association, Inc. (ASNA) filed a Petition for Reconsideration (Petition) of the Commission's July 6, 1989, developmental grants to the County of San Bernardino (County). Those grants, issued pursuant to waiver orders,[1] authorize an 800 MHz public safety communications system comprised of eighteen discrete, individually-licensed stations. Nine of the eighteen stations will be used for operations on frequencies offset from non-public safety frequencies and have been licensed on a developmental basis. The nine remaining stations have been licensed for regular five year terms because the relevant frequencies are offset only from public safety frequencies.[2]

2. ASNA requests that the County's developmental grants be set aside and the associated applications be returned to pending status because the County has failed to meet conditions imposed by the Commission's *MO&O*.[3] Specifically, ASNA believes that the County has not complied with the *M O & O*'s requirement to submit a "detailed justification" for use of offsets to non-public safety spectrum.[4] ASNA further argues that any materials previously submitted by the County were inadequate because the "[Commission] would not have modified the Bureau's Order to require a frequency-by-frequency, site-by-site review of the County's requirements."[5] ASNA finally contends that the County's June 13, 1989, letter to the Commission, which may have been intended to meet the *M O & O*'s requirement for an additional showing, also did not adequately address the use of any of the proposed non-public safety offset frequencies.[6] The County has not replied to ASNA's Petition.

3. ASNA's Petition relies upon its interpretation of the Commission's *M O & O*, and particularly, the *M O & O*'s discussion of the conditions attached to the County's waiver grants. The *M O & O* affirms the Bureau's conditional grants to the County, with certain modifications. These modifications were prompted by the Commission's adoption of the National Public Safety Plan, which allocated to the Public Safety Radio Services six additional megahertz of spectrum in the 800 MHz band.[7] The County was thus required to reassess spectrum requirements for its proposed system and then, to the extent possible, to maximize use of offsets from frequencies in the public safety pool.[8]

4. To further clarify the Bureau's *Order* and to make certain that the County made full use of whatever 800 MHz public safety spectrum was available, the *M O & O* specified a two-step licensing procedure for all stations using frequencies offset from non-public safety channels. To accomplish the first step, the County would review its frequency needs and justify use of all offsets from non-public safety frequencies. Developmental grants authorizing use by the County of the non-public safety offsets would then be issued. The second step of the licensing process requires the County to conduct tests at the stations utilizing non-public safety offsets to determine levels of interference. Once interference testing has been concluded and the results have been submitted to the Commission, permanent licensing of the offsets to non-public safety frequencies could take place.[9]

5. ASNA essentially telescopes the two-step licensing procedure into a unified process that would require the County to analyze the interference potential of each non-public safety offset prior to grant of developmental authorizations. ASNA's interpretation of the Commission's *M O & O* is incorrect. The only prerequisite for developmental grants on the non-public safety offsets is that the County demonstrate that it has reassessed the extent to which its frequency needs can be satisfied from public safety offsets and has, if necessary, revised its non-public safety offset requirements. We find that the County's June 13, 1989, letter satisfies the first step of the licensing process. Specifically, the County's letter indicates that a) the County has surveyed all channels originally requested to confirm its requirements; b) the County has also participated in the regional planning process and, as a result, has secured a number of public safety pool channels, thereby decreasing the need for channels offset to non-public safety frequencies; and c) the County will rely on its interference tests to determine which of the non-public safety offsets would be best for permanent licensing. The *M O & O* requires nothing more of the County in order to obtain developmental grants. Clearly, the Commission intended the Bureau to issue developmental licenses first, after which the County would conduct tests before placing any station in full operation.[10] We note, however, that the County will be required to complete a frequency-by-frequency, site-by-site analysis of interference potential prior to any permanent licensing on non-public safety offsets.[11]

6. Accordingly, pursuant to Section 0.131(a) of the Commission's Rules, 47 C.F.R. § 0.131(a), IT IS ORDERED that the Petition for Reconsideration of developmental license grants to the County of San Bernardino is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Acting Chief, Private Radio Bureau

FOOTNOTES

[1] Requests for Waivers of Part 90 of the Commission's Rules by the County of San Bernardino to Operate a County-Wide Public Safety Communication System in the 800 MHz Band, 2 FCC Rcd 6721 (1987) (*Order*), *aff'd* 3 FCC Rcd 6033 (1989) (*M O & O*).

[2] *M O & O*, para. 15.

[3] Informal concurrences with the ASNA Petition in the form of letters have been received from the Association of American Railroads; the Special Industrial Radio Service Association, Inc.; and San Diego Gas and Electric Company.

[4] Petition, 2-3.

[5] Petition, 5.

[6] Petition, 5-6.

[7] *M O & O*, para. 2.

[8] *Id.*

[9] *M O & O*, paras. 15 and 23.

[10] *M O & O*, para. 23.

[11] *M O & O*, para. 16.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VIRGIN ISLANDS TELEPHONE CORPORATION
Tariff F.C.C. No. 1 Transmittal No. 6

Switched and Special Access
Rate Adjustment

ORDER

Adopted: December 28, 1989; Released: December 29, 1989

By the Chief, Common Carrier Bureau:

1. On December 15, 1989, the Virgin Islands Telephone Corporation (Vitelco) filed revisions to its Tariff F.C.C. No. 1 to increase its switched and special access rates on an interim basis. These revisions are scheduled to become effective January 1, 1990. No petitions against the tariff have been filed.

2. Vitelco argues that its current rates do not accurately reflect present level of demand in the U.S. Virgin Islands following the damage caused by Hurricane Hugo in September 1989. Tr. No. 6, Section II, Reason for Filing at 1. Of immediate concern to Vitelco is the decrease in its revenue stream caused by inoperable interstate access lines and damaged customer premises. Vitelco estimates that the storm destroyed 75 percent of its interstate access lines and resulted in a 28 percent decline in billed carrier access minutes and a 24 percent decrease in demand. *Id.*[1] It does not expect demand to return to pre-hurricane levels until after the first six months of 1990. Because of prohibitions against retroactive ratemaking, Vitelco states that the only way it can recover revenue losses since the hurricane is to effect an increase in its access rates. It maintains that it currently lacks the flexibility to reduce expenses in spite of curtailed demand. *Id.* at 2.

3. Therefore, Vitelco seeks to restore its revenue stream to pre-hurricane levels by increasing its interstate access rates in direct proportion to the decrease in demand. *Id.* at 1, 4. This increase will raise switched access rates an average of 28.5 percent and special access rates approximately 2 percent. Tr. No. 6, Section I, Explanation of Changed Matter at 1. Vitelco stresses that this increase is necessary to ensure the financial integrity of the corporation. It explains that the revised rates do not include any increase to cover losses due to premature plant retirement and extraordinary maintenance expenses attributable to the hurricane. Vitelco believes it will be in a better position to quantify these items in its access tariff filing due April 1, 1990. Tr. No. 6, Section II, Reason for Filing at 4-5.

4. The Common Carrier Bureau has concluded that it is in the public interest to allow Vitelco's interim rate increase to become effective. Allowing Vitelco to preserve its pre-hurricane revenue stream will enable the company to provide interstate access services while it seeks to repair the hurricane damage. However, because the possibility exists for Vitelco to accumulate earnings above its authorized rate of return as a result of these changes, we will suspend the revisions for one day, impose an accounting order, and initiate an investigation into the reasonableness of these rates. We will designate the specific issues to be examined in this investigation in a subsequent Order.

5. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), an investigation is instituted into the lawfulness of the tariff revisions filed by the Virgin Island Telephone Corporation in Tariff F.C.C. No. 1, Transmittal No. 6.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the instant tariff revisions filed by the Virgin Island Telephone Corporation ARE SUSPENDED for one day.

7. IT IS FURTHER ORDERED that the Virgin Islands Telephone Corporation SHALL FILE tariff revisions reflecting this suspension no later than January 8, 1990. Special Permission No. 89-1014 is assigned for this purpose and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

8. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Virgin Islands Telephone Corporation shall keep accurate account of all amounts received pursuant to the rates which are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] *See also* Letter to Chief, Tariff Division, from Gertrude J. White, Counsel to Vitelco, Dec. 1, 1989, at 4.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

January 1, 1990
Local Exchange Carrier
Access Tariff Filings

ERRATUM

Released: December 29, 1989

By the Chief, Common Carrier Bureau:

1. On December 21, 1989, the Common Carrier Bureau (Bureau) released an Order in the above-captioned proceeding.[1] Paragraph 1 of the *December 1989 Access Order* stated, as an introductory description of the filings,

> These filings would reduce interstate access rates by $550 million. End user charges would increase by $42 million, switched access rates would decrease by $608 million, special access rates would increase by $16 million, and directory assistance access rates would decrease by $1 million on an annualized basis for the period from January 1, 1990, through June 30, 1990.

These two sentences are corrected to read:

> These filings would reduce interstate access rates by $815 million. End user charges would increase by $42 million, switched access rates would decrease by $790 million, special access rates would decrease by $21.5 million, and directory assistance access rates would decrease by $4 million on an annualized basis for the period from January 1, 1990, through June 30, 1990.

This correction to the introductory descriptive language has no impact on the subsequent analysis in the *December 1989 Access Order*.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] January 1, 1990 Local Exchange Carrier Access Tariff Filings, Memorandum Opinion and Order, DA 89-1642, released Dec. 21, 1989 (*December* 1989 *Access Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-609

In re Applications of

FAMILY STATIONS, INC. File No. BRH-880531YB

For Renewal of License of Station WFSI(FM), Annapolis, Maryland

and

FM ANNAPOLIS, INC. File No. BPH-880901MA

For a Construction Permit for a New FM Broadcast Station on Channel 300B at Annapolis, Maryland

HEARING DESIGNATION ORDER

Adopted: December 7, 1989; Released: January 8, 1990

By: Chief, Audio Services Division:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration: (a) the application of Family Stations, Inc. ("Family") for renewal of license of Station WFSI(FM), Annapolis, Maryland; and (b) the application of FM Annapolis, Inc. ("FMAI") for a construction permit for a new FM broadcast station at Annapolis, Maryland. The two applications are mutually exclusive because FMAI proposes to operate on Channel 300B, the channel on which WFSI(FM) presently operates.

2. On January 12, 1989, Family filed a Petition to Deny the application of FMAI. In support, Family claims that based on the 7.5 minute U.S.G.S. topographic quadrangle map submitted by FMAI in its application, the ground elevation above mean sea level at the proposed site is 21 meters, not 27 meters as FMAI indicated in Section V-B, Item 7(a)(1) of its application. In its Opposition, filed January 25, 1989, FMAI argues that the ground elevation above mean sea level is consistently represented throughout its application and that the alleged error cited by Family is a matter involving acceptability, not tenderability. In its Reply, Family counters that the six meter discrepancy in ground elevation above mean sea level cannot be resolved confidently and reliably by drawing on the application as a whole. Family also insists that the error is a tenderability matter.

3. The U.S.G.S. topographic map submitted in FMAI's application shows the proposed site between two contour lines. Therefore, it is impossible to determine from the map the exact ground elevation above mean sea level. The ground elevation above mean sea level of 27 meters, as stated in Section V-B, Item 7(a)(1) of FMAI's application does, however, appear to be reasonably accurate. Family, on the other hand, does not provide detailed evidence that the actual elevation is 21 meters. In addition, the alleged error is not a tenderability defect since the same value is provided consistently throughout FMAI's application. On December 16, 1988, FMAI filed a timely amendment specifying a different transmitter site location. Based on the foregoing, the Petition to Deny will be denied.

4. On September 19, 1989, Family filed a "Petition for Reconsideration; Alternatively, Further Petition to Deny." The arguments raised therein are essentially similar to those in Family's Petition to Deny. After careful consideration, this pleading, too, will be denied.

5. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent *Order*, upon the following issues:

(a) To determine which of the proposals would, on a comparative basis, better service the public interest; and

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

6. IT IS FURTHER ORDERED, That, since FMAI has proposed a directional antenna, if FMAI's application is granted, its construction permit shall contain the following CONDITION for its FM directional antenna:

Neither the horizontally nor vertically polarized radiation component shall exceed 50 kW at any azimuth and each component shall be restricted to the following values at the azimuths specified:

13.8 kW at 330^0T

25.1 kW at 68^0T

In addition, neither radiation component shall increase at a rate exceeding 0.2 dB per degree from the azimuths of restricted radiation specified above nor exceed a maximum-to-minimum ratio of 15 dB. The rms of the vertically polarized radiation pattern shall not exceed that of the horizontally polarized radiation pattern.

The horizontal and vertical radiation patterns as submitted with the application for construction permit are authorized by this construction permit. Changes made to these patterns will require the filing of FCC Form 301 for commercial stations or FCC Form 340 for educational stations to modify this construction permit BEFORE PROGRAM TESTS ARE AUTHORIZED.

BEFORE PROGRAM TESTS ARE AUTHORIZED, the permittee shall submit the results of a complete proof-of-performance to establish the horizontal plane radiation patterns for both the horizontally and vertically polarized radiation components. This proof-of-performance may be accomplished using the complete full size antenna, or individual bays therefrom, mounted on a supporting structure of identical dimensions and configuration as the proposed structure, including all braces, ladders, conduits, coaxial lines and other appurtenances; or using a carefully manufactured scale model of the entire antenna, or individual bays therefrom, mounted on an equally scaled model of the proposed supporting structure, including all appurtenances. Engineering exhibits should include a description of the antenna testing facilities and equipment employed, including appropriate photographs or sketches and a description of the testing procedures, including scale factor, measurements, frequency, and equipment calibration.

BEFORE PROGRAM TESTS ARE AUTHORIZED, the permittee shall submit an affidavit from a licensed surveyor to establish that the directional antenna has been oriented at the proper azimuth.

7. IT IS FURTHER ORDERED, That the Petition to Deny, filed on January 12, 1989, and the Petition for Reconsideration; Alternatively, Further Petition to Deny, filed on September 19, 1989, by Family Stations, Inc. ARE DENIED.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That to avail themselves of an opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this *Order*, file with the Commission, in triplicate, a WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this *Order*.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give NOTICE of the hearing within the time and in the manner prescribed, and shall ADVISE the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay
Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-610

In re Application of
KUMRA, RAVEESH K.

For construction authority to establish a new cellular system to operate on Frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve Market 340, California 5 - San Luis Obispo Rural Service Area — File No. 10019-CL-P-340-A-88

HEARING DESIGNATION ORDER

Adopted: December 18, 1989; Released: January 8, 1990

By the Chief, Common Carrier Bureau:

1. On July 17, 1989, Raveesh K. Kumra (Kumra) was named tentative selectee for the non-wireline Block A construction authorization for the California 5 (San Luis Obispo) Rural Service Area (RSA).[1] Subsequently, allegations were filed with the Commission which indicated that Kumra may have been the real party in interest behind the application for the non-wireline license in the Elmira, New York Metropolitan Statistical Area (MSA Market No. 284), filed by Kenneth E. Tubman (Tubman). These allegations, if true, could reflect adversely on Kumra's qualifications to be a cellular radio licensee of the Commission. Since we are presented with a substantial and material question of fact on this issue, we are designating the matter for evidentiary hearing.

2. Tubman was the licensee of the non-wireline cellular telephone system in the Elmira MSA. The license for this system was granted to Tubman on September 4, 1987. On August 23, 1988, Tubman filed an application to modify the Elmira authorization by increasing the size of the Cellular Geographic Service Area (CGSA) and on September 22, 1988, he filed an amendment to the modification application ("amendment").[2]

3. In his amendment, Tubman submitted a copy of a complaint filed against him in the Superior Court of California by Western Cellular Management, Inc. (Western), a company owned by Kumra. Tubman also submitted his answer to the complaint. In its complaint, Western alleged that it had entered into three contracts with Tubman relating to the Elmira MSA. The first contract, according to Western, was an application agreement, signed on or about April 5, 1986 (but dated March 16), which called for Western to provide Tubman with 20 applications for cellular radio licenses in 20 MSAs, which Kumra would file in Tubman's name. For these applications, Tubman agreed to pay $5,000 with an additional amount due for each cellular interest Tubman obtained.

4. The second contract, according to Western's complaint, was a management agreement, orally agreed upon in December of 1986 (after Tubman had won the Elmira lottery) and reduced to writing in May of 1987. Under this contract, Western agreed to take the necessary steps to see that Tubman received a construction authorization for Elmira, to do what was necessary to get the system built, and then to manage its operation. In return, Western was to receive a 45% ownership interest in the Elmira authorization.

5. The third contract, according to Western, was an oral sales agreement entered into in December of 1987, whereby Tubman agreed to transfer the remaining 55% of his Elmira interest to Western.

6. Western's suit claimed that Tubman breached all three contracts. In his answer in the Superior Court litigation, Tubman stated that the application agreement and the management agreement were shams and were intended to cover-up the true relationship between Tubman and Western. According to Tubman, he and Kumra/Western [3] had oral agreements which predated the written application and management agreements. Tubman represented that the prior oral agreements provided that Kumra/Western would prosecute applications filed in Tubman's name and would ultimately receive the "controlling interest" in any cellular authorization granted to Tubman. Tubman further described the oral agreements as an "investment contract," by which Kumra promised to see that Tubman did not get hurt by the arrangement and would realize a monetary gain. Tubman also denied that he had entered into any oral sales contract.

7. In his amendment, Tubman did not reject or explain any of the allegations he made in his answer to Western's lawsuit. On January 27, 1989, the Commission's staff directed a letter to Tubman seeking a clarification of the representations made in his above-described answer. In his response, dated April 21, 1989, Tubman affirmed that there was an oral agreement between himself and Kumra governing the preparation and filing of the Elmira application. Tubman stated that Kumra agreed to prepare and file the Elmira application at no charge to Tubman and that he (Tubman) was obligated to transfer 95% of any Elmira interest he won to Kumra.

8. As set forth in his answer in the above referenced civil suit, one of Tubman's affirmative defenses to Western's allegations was that he was not the real party in interest behind his Elmira application. He represented in his answer that he had agreed with Kumra that Western would prepare the Elmira application in Tubman's name and would ultimately receive 95% of any interest awarded to Tubman. If this is true, Kumra/Western appears to have been the real party in interest behind Tubman's Elmira application, a violation of Section 22.13 (a)(1) of the Commission's rules, 47 CFR § 22.13 (a)(1).

9. We now have Kumra's application in the San Luis Obispo RSA before us. We are unable to determine, based on the foregoing information, if Kumra was the real party in interest in the Elmira, New York MSA application filed by Tubman. Thus, we are presented with a substantial and material question of fact which could bear on

Kumra's basic qualifications to be a Commission licensee. In order for us to act on Kumra's application in the San Luis Obispo RSA, it is necessary to resolve this question of fact and designate the real party in interest issue for hearing.

10. WHEREFORE, it is HEREBY ORDERED, that the captioned application IS DESIGNATED FOR HEARING pursuant to Section 309 (e) of the Communications Act of 1934, as amended, upon the following issues:

1. To determine all the facts and circumstances surrounding the preparation and filing of the application of Kenneth E. Tubman for the non-wireline cellular license in the Elmira, New York MSA;

2. To determine the facts and circumstances of any relationship, agreement or understanding between Kenneth E. Tubman, Raveesh K. Kumra and Western Cellular Management, Inc. relating to the Elmira application and authorization;

3. To determine, on the basis of the evidence adduced, whether Raveesh K. Kumra was the real party in interest behind the Elmira, New York MSA application;

4. To determine, on the basis of the evidence adduced, whether Raveesh K. Kumra possesses the requisite character qualifications to be a cellular radio licensee of the Commission;

5. To determine, based upon all the foregoing issues, whether grant of the captioned application filed by Raveesh K. Kumra for the Block A cellular license in the San Luis Obispo, California RSA, would be in the public interest, convenience and necessity.

11. IT IS FURTHER ORDERED, that the Chief, Common Carrier Bureau is made a party to this proceeding and, pursuant to Section 309 (e) of the Communications Act, the burden of proceeding with the introduction of evidence and the burden of proof shall be on the non-wireline applicant/selectee in the San Luis Obispo, California RSA.

12. IT IS FURTHER ORDERED, that the applicant/selectee may avail himself of an opportunity to be heard by filing with the Commission, pursuant to Section 1.221(c) of the Commission's rules, 47 CFR § 1.221 (c), within 20 days of the mailing of this Designation Order to the applicant/selectee, a written notice stating his intention to appear for hearing and present evidence on the issues specified in this Designation Order.

13. This Order is issued pursuant to Section 0.291 of the Commission's Rules and is effective on its release date.

14. The Secretary shall cause a summary of this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Public Notice, Report No. CL-89-213 (released July 17, 1989).

[2] On June 23, 1989, Tubman filed an application for assignment of the Elmira MSA license to Crowley Cellular Telecommunications (File No. 03419-CL-AL-1-89). The application was granted October 24, 1989, subject to various conditions.

[3] In his answer, Tubman does not distinguish between Kumra and Western, but uses the names interchangeably. It appears, therefore, from Tubman's answer, that Kumra, as its sole owner, was acting at all times on behalf of Western.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Puerto Rico
Telephone Company
Equal Access
Conversion Schedule

MEMORANDUM OPINION AND ORDER

Adopted: December 29, 1989; Released: December 29, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

A. Summary

1. On July 14, 1989, the Puerto Rico Telephone Company (PRTC) filed a Petition[1] seeking a ruling that PRTC is no longer required to implement Feature Group D (FGD) equal access by December 31, 1989, as required by the *Puerto Rico Order*.[2] In the alternative, PRTC requests a waiver of the year-end 1989, equal access conversion deadline. We deny PRTC's request for declaratory ruling, but grant its request for a waiver of the equal access conversion deadline through September 30, 1990. We also clarify that PRTC must provide AT&T and any other off-island carrier with the services that they request for use in providing their own operator services no later than September 30, 1990. In addition, we decline to require that PRTC implement equal access on a phased basis, and accept its proposed timeline for the equal access presubscription balloting process.

B. Background

2. The *Puerto Rico Order* found that PRTC's entry into the off-island domestic and international markets was in the public interest, subject to a number of conditions designed to ensure fair competition. [3] Among other things, the Commission noted PRTC's representation that PRTC would implement full mainland style FGD equal access throughout PRTC's service territory by the end of 1989 and made implementation of that commitment a condition of PTRC's entry into the off-island market. The Commission stated, "[f]or a variety of reasons, we believe that requiring PRTC to implement full mainland style FGD equal access is appropriate in the unique combination of circumstances presented by PRTC's entry into the off-island markets."[4] The Commission cited PRTC's plan to enter the off-island market directly, rather than through a separate subsidiary, and its status as a government-owned LEC, as among the factors leading to this conclusion.[5] The Commission also emphasized that the requirement for expedited equal access conversion should not place an unanticipated burden on PRTC since PRTC itself had represented that it would complete conversion by the end of 1989.[6] The Commission added, "[w]e believe that requiring compliance with these representations is a reasonable means of insuring full and fair competition in the Puerto Rico off-island markets."[7]

3. PRTC subsequently substituted an affiliate, Telefonica Larga Distancia de Puerto Rico (TLD), for itself as the applicant for certain off-island facilities authorizations and licenses. Both TLD and PRTC are owned by the Puerto Rico Telephone Authority (PRTA), a corporation which is owned by the Commonwealth of Puerto Rico. At the same time, PRTA sought a declaratory ruling that TLD would qualify for non-dominant regulatory treatment in the provision of both domestic and international off-island services.[8] The Common Carrier Bureau found TLD non-dominant in the provision of off-island services, thus allowing TLD to enter the domestic off-island market without a Section 214 facility authorization, and granted TLD's Section 214 application for international off-island service.[9] In declaring TLD non-dominant, the Bureau stated that it did not intend to modify any of the requirements of the *Puerto Rico Order*.[10] The *Section 214 Authorization Order* also stated that TLD's authorization for off-island service was contingent on PRTC's compliance with the conditions adopted in the *Puerto Rico Order*.[11]

II. EQUAL ACCESS REQUIREMENTS

A. PRTC's Petition for Declaratory Ruling

4. The PRTC petition states that PRTC is committed to providing equal access "as soon as possible,"[12] but argues that the equal access condition on PRTC's entry into the off-island services market is no longer justified.[13] Thus, PRTC argues that it should be allowed to follow the less stringent requirements applied to other independent telephone companies.[14] In support of its position, PRTC states that the equal access conversion requirement was established as a condition for PRTC's entry into the off-island market, adding that it has since withdrawn all of its applications to provide off-island message service. PRTC asserts that it no longer intends to provide off-island MTS,[15] and thus, the "factual predicate" for these requirements no longer exists[16] and the "policy justifications for the conditions have no force or merit."[17]

5. In support of its Petition, PRTC also points to the Commission's statement in the *Puerto Rico Order* to the effect that the use of a separate corporate entity for the provision of interexchange services by a LEC reduces the need for safeguards to ensure fair competition.[18] PRTC emphasizes that PRTC and TLD are committed to maintaining an arms-length relationship and to complying with the requirements for non-dominant treatment of TLD. PRTC contends that this is sufficient to ensure that PRTC does not discriminate or cross-subsidize in favor of TLD.[19] PRTC also argues that government ownership should not change its obligation to implement equal access according to the Commission rules and regulations established for independent telephone companies.[20]

B. Positions of the Parties

6. Contel ASC and the United States Telephone Association (USTA) support PRTC's request for declaratory ruling.[21] They argue that since PRTC no longer proposes to provide off-island MTS, there is no basis for requiring the implementation of equal access on the terms established in the *Puerto Rico Order*.[22] Rather, they contend that PRTC should be subject to the equal access obligations

applicable to other independent telephone companies.[23] USTA adds that PRTC has already exceeded these requirements.[24] USTA also argues that PRTC's government ownership is not relevant and need not be considered in this proceeding.[25]

7. MCI Telecommunications Corp. (MCI), the American Telephone and Telegraph Co. (AT&T), and Comserv Corp. (Comserv) argue that PRTC's request for declaratory ruling concerning its equal access obligations should be denied. AT&T and MCI argue that the Bureau has made clear in the *Non - dominant Order* and the *Section 214 Authorization Order* that PRTC must comply with the conditions established in the *Puerto Rico Order* regardless of whether it enters the market directly.[26] They also emphasize that the Bureau specifically conditioned TLD's participation in the off-island market on PRTC's compliance with the requirements of the *Puerto Rico Order*.[27]

8. AT&T argues that PRTC's decision to provide service through TLD does not alter the need for the safeguards established by the Commission,[28] stating that PRTC's initial proposal to enter the off-island market directly was only one of the factors considered by the Commission in establishing safeguards. AT&T argues that the other factors that led the Commission to impose the equal access requirement on PRTC remain unchanged. In particular, AT&T focuses on PRTC's status as a government-owned LEC free from Commonwealth regulatory oversight and argues that this makes it less likely that competitors will be able to achieve equal access to PRTC's local facilities.[29] MCI also argues that PRTC's decision not to enter the off-island market directly should not obviate its obligation to provide equal access to the public.[30]

9. Comserv argues that the provisions of the *Puerto Rico Order* were "properly justified" and that those provisions must remain in effect to ensure fair competition.[31] Comserv also states that PRTC enjoys the "added power of being a political monopoly since it is owned by the government of Puerto Rico . . ., "[32] adding that there is little distinction between PRTC and TLD.[33] Comserv contends that removing the requirements of the *Puerto Rico Order* "would deny companies such as ours one of the principal hopes upon which to defend our right to compete in a reasonably fair environment."[34]

C. Discussion

10. We deny PRTC's request for declaratory ruling.[35] Initially, we note that our conclusion that PRTC's equal access requirement remains in effect is consistent with the *Non-dominant Order* and the *Section 214 Authorization Order*, which specify that PRTC must comply with conditions established in the *Puerto Rico Order* even though off-island service will be provided by TLD.[36] In fact, the *Section 214 Authorization Order* specifically reviews PRTC's compliance with the non-structural safeguards established in the *Puerto Rico Order*,[37] stating that PRTC's compliance with these requirements is a prerequisite to TLD's entry into the off-island market.[38] These orders in no way suggest that PRTC's failure to withdraw all of its applications for off-island service was a factor in the decision to require that PRTC comply with the requirements of the *Puerto Rico Order*. To the contrary, these orders clearly recognize that off-island service will be provided by TLD rather than PRTC.

11. While the Commission cited PRTC's plan to enter the off-island market directly, rather than through a separate subsidiary, as one of the factors justifying the requirement for equal access conversion, this was only one of a number of factors discussed by the Commission. The Commission also cited "PRTC's status as a government-owned LEC, among other things . . . "[39] as warranting this requirement. In addition, the Commission placed considerable emphasis on the fact PRTC had voluntarily stated that it would implement full mainland style FGD throughout its service territory by the end of 1989, in its filings before the Commission. Thus, the Commission found that this was "[u]nlike other situations in which an independent telephone company may have relied on being able to satisfy its equal access obligations by meeting the minimum requirements set out in our *Phase III Order* . . . ."[40] The Commission further stated that "requiring compliance with these representations is a reasonable means of ensuring full and fair competition in the Puerto Rico off-island markets."[41]

12. We believe that these factors continue to justify the requirement that PRTC implement equal access on an expedited basis. The position of PRTC and TLD as government-owned corporations adds a dimension that is not present with other LEC affiliates entering the interexchange market.[42] The possible implications of government ownership of a competitive entrant in the interexchange market include the existence of incentives for the government to favor its interexchange entrant for the carriage of government traffic,[43] potential cost benefits due to government ownership[44] and the possibility that the government-owned carrier will receive preferential treatment in its dealings with other governmental agencies.[45]

13. The Commission's conclusion that PRTC's implementation of equal access on an accelerated basis will help to ensure full and fair competition is still applicable. The implementation of equal access has played a vital role in facilitating competition on the mainland, and is likely to produce similar benefits in Puerto Rico. Many of the IXC comments filed in this proceeding also stress the importance of equal access to a fully competitive environment.[46] Eliminating this requirement would be unfair to competitive entrants that may have invested resources in this market relying on the Commission's requirement that PRTC implement equal access on an expedited basis.

14. In addition, we emphasize that the requirement for equal access conversion originated in representations that PRTC made voluntarily in the proceedings considering its entry into the off-island market. Holding PRTC to commitments made in that context should not impose unreasonable burdens on PRTC, although the schedule that PRTC proposed involved a more ambitious conversion schedule than that required by the Commission's order in *Phase III* of the *MTS and WATS Market Structure* proceeding.[47] We also note that the Commission has held another large LEC to an equal access conversion schedule that exceeded the minimum requirements established in the *Phase III* order.[48]

III. Waiver of Deadline for PRTC's Equal Access Conversion

A. PRTC Petition for Waiver

15. In the event the Commission fails to grant the request for declaratory ruling, PRTC asks for a waiver of the equal access conversion deadline until the end of the third quarter of calendar 1990.[49] PRTC states that it has

almost completed the reconfiguration and modernization of its network necessary for equal access, but adds that it has not begun the notice and presubscription phase of equal access conversion, and thus will not be able to complete equal access conversion by the end of 1989.[50]

16. PRTC states that in addition to the network reconfiguration and other changes required for equal access conversion by other telephone companies, it has had to replace its electromechanical end offices with digital end offices, convert digital end offices that had non-standard signalling systems, and convert its network to the North American Dialing Plan.[51] PRTC adds that despite a "tremendous commitment of resources, it has experienced unanticipated delays beyond its control in the modernization and reconfiguration of its network that are prerequisites for . . . implementation of full Feature Group D ("FGD") access."[52] In support of this statement, PRTC cites a number of unanticipated difficulties, including the need for two access tandems rather than one,[53]delays in software and hardware delivery,[54] the need for outside contractors to assist in conversion to the North American Dialing Plan,[55] with the concomitant requirement for competitive bidding,[56] and problems with the "equal access data processing functions" of one of its switches.[57]

B. Positions of the Parties

17. The parties generally acknowledge PRTC's efforts to implement equal access,[58] and no one opposes PRTC's request for a limited extension of the equal access conversion date. Contel ASC states that "[i]n light of the good-faith effort made by PRTC to comply with the equal access deadline and the carrier's commitment to complete the conversion in a short timeframe, the Commission should waive the December 31 deadline . . . ."[59] Contel ASC also notes that the *Puerto Rico Order* stated that the Commission would waive the deadline if circumstances warranted.[60] USTA argues that granting the waiver will allow PRTC time to resolve problems and avoid customer confusion.[61]

18. Although AT&T does not ask the Commission to deny the waiver, AT&T argues that it will be severely prejudiced by a delay in equal access conversion.[62] In particular, AT&T states that it has made capital investments of $2.7 million and allocated other resources to processing off-island operator traffic[63] based on PRTC's representations that PRTC would implement equal access by the end of 1989.[64] As a result, AT&T contends that any extension of the date for equal access conversion should be for a limited period only, and conditioned on PRTC's agreement to enhance the current interim access arrangements for off-island carriers.[65] AT&T states that the *Puerto Rico Order* acknowledged that enhancements to interim access would be appropriate if the implementation of equal access is delayed.[66]

19. Specifically, AT&T asks the Commission to require that PRTC provide separate trunk groups, originating automatic number identification (ANI) and answer/disconnect supervision (ADS) [67] by March 1, 1990 to enable AT&T to provide its own operator services.[68] AT&T argues that these features can be provided "at a minimal additional cost and in a relatively short time after PRTC completes its previously scheduled network reconfiguration activities."[69] AT&T also proposes specific changes in the PRTC network to allow provision of the requested services.[70]

20. PRTC states that it is not feasible to provide the services requested by AT&T, and that if such improvements were feasible, their implementation would substantially delay conversion to equal access.[71] PRTC also argues that such enhancements would disadvantage other carriers which can not be provided with these additional features until equal access is implemented.[72] In response to AT&T's proposal for specific changes to the PRTC network, PRTC argues that AT&T does not understand PRTC's network capabilities and therefore underestimates the time and resources required to provide the capabilities requested by AT&T prior to the implementation of equal access.[73] AT&T responds, reiterating its claim that PRTC can readily add the necessary capability to PRTC's switch.[74] AT&T also states that AT&T already provides operator services using PRTC personnel and argues that allowing AT&T to use its own personnel will not afford it any competitive advantages.[75]

21. MCI also opposes AT&T's request for interim access enhancements, arguing that such network changes could divert resources from implementation of equal access.[76] USTA argues that since PRTC is no longer subject to the requirements of the *Puerto Rico Order*, "there is no need to impose any other special requirement to benefit one particular interexchange carrier."[77]

C. Discussion

22. We find that PRTC has shown good cause for a limited waiver of the December 31, 1989, equal access conversion date.[78] PRTC has made substantial efforts to implement equal access in a timely fashion, and states that it has almost completed the process of upgrading and reconfiguring its network to allow conversion to equal access. Furthermore, none of the parties oppose a limited extension of the date for equal access conversion. Accordingly, we extend the deadline for implementation of full mainland style FGD equal access by PRTC to September 30, 1989.

23. We do not require as a condition of this waiver, however, that PRTC provide AT&T with enhanced interim access allowing AT&T to provide its own operator services prior to the implementation of equal access. While the current record is not clear concerning the expense and difficulty of providing the services requested by AT&T, PRTC alleges that provision of these services would delay implementation of equal access. PRTC also states that the capabilities requested by AT&T will be available as part of FGD equal access.[79] Given the importance of implementing equal access for all off-island carriers, and the fact that AT&T already receives the premium form of interim off-island access,[80] we do not believe that ordering PRTC to provide the requested services prior to implementation of equal access is justified. Our decision to refrain from imposing such a condition is based upon PRTC's representation that the services and facilities described in the AT&T pleading will be provided to AT&T on or before September 30, 1990. Failure to do so would violate equal access obligations imposed upon PRTC.

IV. END OFFICE CONVERSION SCHEDULE

A. PRTC's Petition

24. In its request for waiver, PRTC also seeks Commission approval of its timeline for the presubscription balloting process. PRTC states that it plans to convert all end offices in its service area to equal access as "close to simultaneously as possible." PRTC argues that this will reduce the potential for customer confusion due to PRTC's need to convert to the North American Dialing Plan as well as FGD equal access.[81] PRTC adds that it is "taking action to assure the smoothest possible conversion . . . ."[82] PRTC also states that it has hired experienced outside contractors to supervise the conversion to the North American Dialing Plan and equal access,[83] as well as to manage the equal access balloting process.[84]

25. In addition, PRTC details its proposed presubscription balloting timeline, stating that it plans:

> a) to notify interexchange carriers during the first quarter of 1990 of PRTC's equal access conversion plans and ordering requirements; b) to require IXCs to order FGD equal access by a date 60 days after they are notified; c) to distribute the first FGD presubscription ballots for all PRTC end offices on a date 90 days after IXCs are notified of PRTC's equal access conversion plans and ordering requirements; d) to distribute the second FGD presubscription ballots approximately 50 days after the first ballots are distributed; and e) to convert all PRTC end offices to FGD equal access as close to simultaneously as possible during the third quarter of 1990, . . . starting 180 days after IXCs are notified of PRTC's plans and ordering requirements.[85]

PRTC subsequently clarified certain aspects or this plan.[86]

B. Positions of the Parties

26. USTA supports PRTC's plan for approximately simultaneous conversion, and argues that this plan will reduce the possibility of any IXC being disadvantaged.[87] AT&T opposes PRTC's plan for end office conversion, contending "the Commission has previously found that such a conversion plan would pose unacceptable risks of ... serious errors in the equal access process."[88] AT&T also emphasizes that PRTC previously represented that PRTC would use a phased conversion process, adding that PRTC has not shown any reason for the Commission to allow PRTC to abandon that commitment.[89]

27. MCI asks that the Commission require PRTC to begin the notification process by January 1990, using a staggered three-to-six month schedule for equal access conversion beginning in June, 1990, and ending before the close of 1990.[90] MCI asserts that this implementation schedule will allow the conversion process to proceed more smoothly than the "flash cut" schedule PRTC proposes.[91] Comserv states that it would like to see a "trouble free flash cut" of the entire island, although it acknowledges that there probably will be problems associated with conversion.[92]

C. Discussion

28. We do not believe that it is appropriate to require use of a phased conversion schedule. The *Puerto Rico Order* noted PRTC's initial plan to convert all end offices to equal access on a "flash cut" basis, and recommended that PRTC consider a phased plan.[93] However, the Commission did not require PRTC to use a phased conversion plan. We do not believe that the present record justifies a departure from the Commission's decision in the *Puerto Rico Order*, although we again emphasize the importance of a fair and impartial equal access balloting process.

29. The general outlines of PRTC's proposed timeline for the presubscription balloting process appear to reflect existing Commission requirements, although there may be certain differences.[94] Moreover, none of the interexchange carriers objects to the proposed timeline. Accordingly, we waive the existing equal access presubscription balloting requirements to the extent necessary to permit use of the timeline proposed by PRTC. PRTC is required, however, to comply with existing Commission requirements concerning equal access presubscription balloting in all other respects.[95]

V. ORDERING CLAUSES

30. Accordingly, IT IS ORDERED, that PRTC's request for declaratory ruling described above IS DENIED, and that the waiver request described herein IS GRANTED to the extent provided herein.[96]

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] PRTC Petition for Declaratory Ruling Or, In the Alternative, Waiver.

[2] Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service Off the Island of Puerto Rico, CC Docket No. 86-309, 2 FCC Rcd 6600 (1987), *pets. for recon. pending (Puerto Rico Order)*.

[3] In addition, the Commission established standards for interim access for multiple off-island carriers and requirements concerning disclosure of network information, and the treatment of customer proprietary network information. *Puerto Rico Order*, 2 FCC at 6606-6613.

[4] *Id.* at 6607.

[5] *Id.* at 6605-6612.

[6] *Id.* at 6607.

[7] *Id.*

[8] The Commission had found that PRTC did not qualify for non-dominant treatment if it entered the off-island market directly rather than through a separate subsidiary. *Puerto Rico Order*, 2 FCC Rcd at 6611. In order to qualify for non-dominant regulatory treatment under the policies adopted in the *Competitive Carrier* proceeding, a LEC must enter the interexchange market through an affiliate with separate books of account and no joint ownership of switching and transmission facilities. Such a LEC must also take service from the affiliated LEC pursuant to tariff. Policies and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations

Therefor, CC Docket No. 79-252, 98 FCC 2d 1191, 1198 (1984) (*Fifth Report and Order), recon. denied.* FCC 85-572 (released Nov. 20, 1985).

[9] Petition of Puerto Rico Telephone Authority for a Declaratory Ruling That a Subsidiary Corporation Offering Interstate and International Message Telephone Service Off of the Island of Puerto Rico is Non-dominant, File No. ENF-88-15, 3 FCC Rcd 5675 (Com. Car. Bur. 1988) (*Non-dominant Order);* La Telefonica Larga Distancia de Puerto Rico, File Nos. I-P-C-81-039-A, A-1, I-T-C-85-157, A, A-1, CSG-85-048-P(A), A-1, 3 FCC Rcd 5937 (Com. Car. Bur. 1988) (*Section 214 Authorization Order).*

[10] The *Non-dominant Order* specifically states:

> our action is intended to modify neither PRTC's nor PRCA's obligations under outstanding Commission orders to provide timely access arrangements for domestic and international off-island carrier services nor the Commission's expectations in that regard based on representations to it made by the Commonwealth of Puerto Rico, PRTC and/or PRCA. 3 FCC Rcd at 5677 (footnote omitted).

[11] The *Section 214 Authorization Order* states that "[a]lthough off-island services will be provided by [TLD], PRTC must comply with these conditions [referring to the entry conditions established in the *Puerto Rico Order*] before [TLD] can be authorized to enter the off-island service market." 3 FCC Rcd at 5940 n. 6. That Order also states that "[TLD's] continued operation in the domestic off-island market is contingent on PRTC's compliance with the conditions adopted in the *Report and Order in CC Docket No. 86-309." Id.* at n.8.

[12] PRTC Petition at 2.

[13] *Id.* at 6.

[14] *Id.* The equal access conversion requirements for independent telephone companies are described in *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, 100 FCC 2d 860, 875 (1985). In general, non-GTE independent telephone companies have three years after an interexchange carrier (IXC) requests equal access from end offices equipped with stored program control switches in which to implement equal access. The independent companies are not subject to any specific deadline for providing equal access in exchanges served by electromechanical switches.

[15] PRTC Petition at 4.

[16] *Id.* at 1. PRTC recognizes that the *Section 214 Authorization Order* and the *Non-dominant Order* did not lift the entry conditions established in the *Puerto Rico Order*, stating that PRTC had not withdrawn its application to provide off-island interstate MTS at that time and thus there may have been some justification for retention of the conditions. However, PRTC states that it has since withdrawn its application and that there is no longer any basis for requiring compliance with the conditions in the *Puerto Rico Order. Id.* at 4. *See also PRTC Reply Comments 4-5.*

[17] PRTC Petition at 1.

[18] *Id.* at 5.

[19] *Id.*

[20] PRTC Reply Comments at 6.

[21] Contel ASC Comments at 1-2; USTA Reply Comments at 2.

[22] Contel ASC Comments at 1-2; USTA Reply Comments at 2.

[23] Contel ASC Comments at 1-2; USTA Reply Comments at 2.

[24] USTA Reply Comments at 2.

[25] USTA Reply Comments at 4.

[26] AT&T Comments at 6-7; MCI Comments at 2, n. 2. AT&T also argues that PRTC must comply with the other safeguards established in the *Puerto Rico Order.* AT&T at 7.

[27] MCI Comments at 2 n. 2; AT&T Comments at 7.

[28] AT&T Comments at 7. AT&T also notes that the *TLD International Resale Order*, released more than two months after PRTC withdrew its remaining off-island MTS application, conditioned TLD's Section 214 grant on compliance with the *Puerto Rico Order.* AT&T Comments at 7 note **; *See also* Telefonica Larga Distancia de Puerto Rico Application for Authority to Operate as an International Resale Carrier, File No. I-T-C-89-044, 4 FCC Rcd 4496. 4497 (1989).

[29] AT&T Comments at 6.

[30] MCI Comments at 2 n. 2.

[31] Comserv Comments at 2.

[32] *Id.* at 1.

[33] For example, Comserv argues that personnel are transferred back and forth between TLD and PRTC. Comserv Comments at 1-2. PRTC argues that transfers of personnel are entirely acceptable. Puerto Rico Reply Comments at 9.

[34] Comserv Comments at 2.

[35] Although PRTC specifically addresses only equal access requirements in its Petition, its arguments might apply to the other conditions established in the *Puerto Rico Order* as well. All of the requirements established in the *Puerto Rico Order* remain in effect, however, unless specifically waived or modified by order.

[36] *Non-dominant Order*, 3 FCC Rcd at 5677; *Section 214 Authorization Order*, 3 FCC Rcd at 5938-5939, 5940 nn. 6 & 8.

[37] *Section 214 Authorization Order*, 3 FCC Rcd at 5938-5939.

[38] *Id.* at 5940, nn. 6 & 8.

[39] *Puerto Rico Order*, 2 FCC Rcd at 6607.

[40] *Id.*

[41] *Id.*

[42] While there may be other government-owned LECs with interexchange affiliates, none of them remotely approaches the size of PRTC, which has 768,367 access lines. USTA Phone Facts § 89 (1989) at 18. In remanding prior FCC decisions authorizing PRTC entry into the off-island market, the D.C. Circuit specifically directed the Commission to afford the existing off-island carrier an opportunity to comment on PRTC's publicly-owned status in the context of a competitive environment. All America Cables and Radio, Inc. v. FCC, 736 F. 2d 752, 759 (D.C. Cir. 1984) (AACR v. FCC).

[43] *See e.g.,* Comments of American Cables and Radio, Inc. (AAC&R), CC Docket No. 86-309, September 15, 1986 at 42 n.**.

[44] The *Puerto Rico Order* discussed potential cost and tax benefits available to PRTC due to its status as a government-owned corporation, but declined to establish specific safeguards in this area. 2 FCC Rcd at 6613. The Commission stated that it would consider these issues in the context of future tariff proceedings, noting that "[r]egulation of PRTC as a dominant carrier will facilitate review of these questions and oversight of competitive developments in the provision of off-island service." *Id.* The decision to accord TLD non-dominant status has greatly reduced the extent of these safeguards. Although the requirement for implementation of equal access does not directly address the competitive effects of potential cost and tax benefits to PRTC and TLD, we believe that the reduced safeguards in this area increase the importance of ensuring equal access to the local exchange and a full opportunity for all entrants to compete for customers through presubscription balloting.

[45] Even if no actual favoritism exists, the appearance of a potential for government action favoring the government-owned corporation could discourage entry.

[46] AT&T Comments at 5-7; MCI Comments at 2-3; Comserv Comments at 1-2.

[47] 100 FCC 2d 860 (1985), *recon. denied*, FCC 86-4 (released January 8, 1986).

[48] *See* Implementation of Equal Access by the Southern New England Telephone Company, 2 FCC Rcd 2312 (1987).

[49] PRTC Petition at ii.

[50] *Id.* at i.

[51] *Id.* at 8. The North American Dialing Plan requires a caller to dial 1 before making an interexchange call. In PRTC's territory callers use 3-digit or 5-digit numbers to make off-island calls.

[52] *Id.* at i.

[53] *Id.* at 10.

[54] *Id.* at 8.

[55] *Id.* at 11 n. 6.

[56] *Id.* at 12.

[57] *Id.* at 9.

[58] *See* MCI Comments at 2; Contel ASC Comments at 2; USTA Comments at 2. *But see* AT&T Comments at 8-10.

[59] Contel ASC Comments at 2.

[60] *Id.*

[61] USTA Reply Comments at 3.

[62] AT&T Comments at 8.

[63] AT&T states that PRTC currently provides operator services for AT&T at a cost that is substantially greater than the cost that AT&T would incur in providing the service for itself. *Id.* at 8.

[64] *Id.*

[65] *Id.* at ii.

[66] *Id.* at 9.

[67] PRTC currently provides ADS to off-island carriers. PRTC Clarification of Reply, October 6, 1989 at 1.

[68] AT&T Comments at 2. 9.

[69] Letter from T.W. Ramsey, District Manager, AT&T, to Donna R. Searcy, Secretary, FCC, November 6, 1989 at 1.

[70] *Id. See* also Letter from T.W. Ramsey, District Manager, AT&T, to Donna R. Searcy, Secretary, FCC, December 8, 1989.

[71] PRTC Reply Comments at ii, 9-12.

[72] *Id.*

[73] Letter from Paul Berman, Attorney for PRTC, to Donna R. Searcy, Secretary, FCC, November 15, 1989. *See* also Letter from Paul Berman, Attorney for PRTC, to Rose Crellin, FCC, December 22, 1989.

[74] Letter from T. W. Ramsey, District Manager, AT&T, to Donna R. Searcy, Secretary, FCC, December 8, 1989.

[75] *Id.* at 3.

[76] Letter from Jodi L. Cooper and John M. Scorce, MCI, to Donna R. Searcy, Secretary, FCC, November 27, 1989.

[77] USTA Reply Comments at 3.

[78] As the parties note, the *Puerto Rico Order* stated that the Commission would waive the equal access conversion date if PRTC shows that it could not reasonably comply with the established schedule. 2 FCC Rcd at 6607.

[79] PRTC Clarification of Reply, October 6, 1989 at 2.

[80] *See Puerto Rico Order*, 2 FCC Rcd at 6608.

[81] PRTC Petition at 17-18.

[82] *Id.* at 18.

[83] *Id.*

[84] *Id.* at 18-19.

[85] *Id.* at 20.

[86] In particular, PRTC states that:

> a) no end office would be converted less than 180 days after the availability of equal access had been announced, b) the deadline for carrier's to order equal access would be 60 days after the availability announcement, c) the first ballots would be sent 90 days after the availability announcement, and d) the second ballots would be sent approximately 140 days after the availability announcement.

Letter from Paul Berman, Attorney for PRTC, to Rose Crellin, FCC, October 20, 1989 at 3-4.

PRTC also revised its plan to state that competitive IXCs are permitted "to market their services directly to customers and submit the customer's order with the underlying letter of agency . . . ." PRTC also stated that customers will have direct access to PRTC to deal with discrepancies "concerning equal access presubscription balloting or facilities." Letter from Paul Berman, Attorney for PRTC, to Rose Crellin, FCC, dated December 7, 1989. We note that PRTC must also allow the IXCs to submit orders without an accompanying letter of agency as long as the IXC maintains the letter on file in case of a discrepancy. *See Investigation of Access and Divestiture Related Tariffs*, 101 FCC 2d 911, 928 (1985); 102 FCC 2d 503, 506 n. 9, 507, 511-512 (1985). *See also* Letter from T.W. Ramsey, AT&T, to Donna R. Searcy, Secretary, FCC, December 19, 1989 at 1-2.

[87] USTA Reply Comments at 3.

[88] AT&T Comments at 10.

[89] *Id.* at 11-12.

[90] MCI Comments at 3-4.

[91] *Id.* at 4.

[92] Comserv Comments at 3.

[93] 2 FCC Rcd at 6607.

[94] For example, in most cases, PRTC describes the schedule for the various steps in the presubscription balloting process in terms of the number of days after interexchange carrier notification of PRTC's equal access conversion plans and ordering requirements. The Commission orders generally describe this timeline in terms of the number of days before the end office cutover. Thus, the timeline proposed by PRTC may not fully comport with existing requirements.

[95] *Puerto Rico Order* 2 FCC Rcd at 6607. *See also* Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911 (1985) *(Allocation Order) modified*, 101 FCC 2d 935 (1985) *(Waiver Order), modified on reconsideration*, 102 FCC 2d 503 (1985); Illinois Citizens Utility Board Petition for Rule Making, 2 FCC Rcd 1726 (1987).

[96] This action is taken pursuant to delegated authority provided in Sections 0.91 and 0.291 of the Commission's rules, 47 CFR §§ 0.91 & 0.291 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

Transmittal Nos. 1721 and 1933

Tariff F.C.C. No. 2

800 Directory Assistance Service

ORDER

Adopted: December 29, 1989; Released: December 29, 1989

By the Chief, Common Carrier Bureau:

1. On August 4, 1989, and November 29, 1989, respectively, American Telephone and Telegraph Company (AT&T) filed Transmittal Nos. 1721 and 1933 to introduce a new option to its 800 Directory Assistance (DA) Service.[1] Under AT&T's offering, providers of 800 service will be able to list their customers' 800 services in AT&T's 800 DA Data Base. US Sprint Communications Company Limited Partnership (US Sprint) and Pacific Bell (Pacific) filed petitions to reject or suspend and investigate AT&T's proposed tariff. AT&T filed a reply. Transmittals 1721 and 1933 are scheduled to become effective January 1, 1990.

2. AT&T proposes to charge 800 service providers monthly and nonrecurring charges for use of a mechanized arrangement, nonrecurring charges for use of a manual arrangement, and monthly charges for each customer listing that an 800 service provider enters in AT&T's DA Data Base. The charges for customer listings vary depending on the area (*i.e.*, nationwide, or one or more states) in which the customer's 800 service is available. AT&T will also charge for additions or changes to existing listings using a manual arrangement; requests for expedited processing of entries to the DA Data Base; and requests from an 800 service provider for a report of all of its customer listings in AT&T's DA Data Base.

3. US Sprint argues that Transmittal 1721 is discriminatory because it apparently will apply only to non-AT&T 800 service providers. US Sprint concludes that AT&T thus would pay lower rates than other 800 service providers and be subject to different terms and conditions. US Sprint Petition at 4-7. In addition, US Sprint contends that the proposed rates are unreasonably high, reflecting AT&T's monopoly power, and inadequately supported under the price cap net revenue test set forth in Section 61.49(g) of the Commission's Rules, 47 C.F.R. § 61.49(g). *Id.* at 8-10. US Sprint also asserts that that the proposed rate structure, which assesses charges per 800 number listed in the DA data base, does not reflect cost causation. *Id.* at 11-12. Finally, US Sprint contends that AT&T should be required to implement safeguards similar to those adopted by the Commission in its *Computer III* proceeding.[2]

4. Pacific argues that AT&T's proposed rates are unlawful because they result in geographically deaveraged rates that cannot be properly justified. Pacific objects to the variable charges that AT&T would assess for listing the numbers of 800 customers that provide service only in one or more states. Pacific contends that AT&T has failed to justify the wide disparity in charges for individual states. Pacific Petition at 2-3. Pacific also accuses AT&T of discriminating against local exchange carrier (LEC) providers of 800 service. *Id.* at 4-5.

5. In its reply, AT&T argues that 800 DA service should be treated as a new service under the price cap rules. AT&T asserts that the cost support material that it provided complies with the price cap rules for new services. AT&T Reply at 2-3. AT&T also argues that US Sprint's argument that a per query rate structure would better reflect costs is meritless. *Id.* at 4. AT&T also submits that its proposed rates cannot be too high because they are based on the cost of providing the service and because they are lower than existing contract rates. *Id.* at 4-5. AT&T denies that the proposed rates are unreasonably discriminatory. It states that the additional verification charge applies to all 800 service providers that offer intraLATA service and not just LECs. *Id.* at 5-6. Finally, AT&T disputes US Sprint's claim that the proposed rates are discriminatory because AT&T does not propose to take 800 DA service under tariff. AT&T contends that the Commission's *800 Data Base Order* required it neither to unbundle 800 DA service from its existing 800 service offerings nor to impute tariffed rates for 800 DA service in setting its rates for 800 service offerings. *Id.* at 6-7.

6. The Common Carrier Bureau has reviewed Transmittal Nos. 1721 and 1933, the documentation supporting the transmittals, and pleadings. We conclude that no compelling argument has been presented that AT&T's proposed tariff revisions are so patently unlawful as to require rejection or that an investigation is warranted at this time.

7. Accordingly, IT IS ORDERED that the petitions to reject or, alternatively, suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. 2, Transmittal Nos. 1721 and 1933, filed by US Sprint Communications Company Limited Partnership and Pacific Bell ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T filed the proposed tariff revisions in response to the Commission's *800 Data Base Order*. Provision of Access for 800 Service, CC Docket No. 86-10, 4 FCC Rcd 2824 (1989) (*800 Data Base Order*). In that Order, the Commission found that 800 DA Service is a monopoly service and that AT&T must offer the service on a nondiscriminatory basis. *Id.* at 2837.

[2] Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986); *modified on recon.* 2 FCC Rcd 3035 (1987) (*Computer III*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEPHONE AND DATA SYSTEMS, INC. — AAD 9-1937

Petition for Waiver of Sections 36.154(e)(1) and (2), and the Definition of "Study Area" contained in Part 36, Subpart H, of the Commission's Rules.

MEMORANDUM OPINION AND ORDER

Adopted: December 29, 1989; Released: January 5, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On November 3, 1989 Telephone and Data Systems, Inc. (TDS)[1] filed a petition[2] seeking waiver of the definition of "study area" set forth in Part 36, Subpart H, [3] and of Sections 36.154(e)(1) and (2)[4] of the Commission's Rules.[5] TDS requests these waivers in order to consolidate study areas of certain of its wholly owned local exchange carriers (LECs)[6] in conjunction with mergers of those companies. To the extent discussed below, we grant the TDS petition.

2. TDS states that it owns and operates 78 local exchange companies, having 80 study areas, in 27 different states. It maintains that these companies are predominantly small, rural companies averaging less than 3300 subscriber lines per study area. TDS has determined that it would be efficient to merge 14 of these local exchange carriers which operate in close proximity or in contiguous service areas into 6 new companies and reduce the related study areas from 14 to 6.

3. The definition of study area contained in Part 36, Subpart H of the Commission's Rules states that the boundaries of a study area shall be frozen as they were on November 15, 1984. Thus, to effectuate the mergers, TDS requires a waiver of that provision.

4. This TDS waiver would also allow TDS to modify certain historical jurisdictional separations factors to reflect the new study area configurations. Section 36.154 of the Commission's Rules prescribes the procedures to be followed in apportioning Exchange Line Cable and Wire Facilities, Category 1, between the state and interstate jurisdictions. Category 1 is first subdivided into three subcategories. Subcategory 1.1 is state private line and state WATS lines, subcategory 1.2 is interstate private line and interstate WATS lines, and subcategory 1.3 is subscriber or common lines that are jointly used for local exchange service and exchange access for state and interstate interexchange services. Sections 36.154(e)(1) and (2) define the procedures for the development of the interstate allocation factor known as the subscriber plant factor (SPF), which is used to determine the interstate portion of subcategory 1.3. The SPF is developed by use of calendar year 1981 subscriber line usage data. Section 36.154 of the Commission's Rules also reflects the Commission's decision to change the allocation factor for Subcategory 1.3 from SPF to 25 percent, and to phase in the change by 1993. The objective of the transition is to produce reasonable and fair results in conjunction with the Commission's access charge plan and allow the targeting of rate support to high cost areas. Under these rules the interstate SPFs were frozen at the 1981 levels until 1986, when the gradual transition to a 25 percent factor began. The transition is now approximately one-half complete.

5. TDS requires a waiver of Section 36.154(e)(1) and (2) to adjust the frozen interstate SPF for the Harlan and Fayetteville Telephone Companies to reflect the consolidated study area. In lieu of using the frozen 1983 SPF for Fayetteville and the frozen 1988 SPF for Harlan, TDS proposes to use existing data to compute a new 1990 base year SPF[7] for the newly merged company study area. A waiver of this rule is not required for the other TDS companies to be merged because they are average schedule companies.[8]

II. SUMMARY OF PETITION

6. TDS believes that merging 14 TDS LECs into 6 new companies would promote the public interest by improving the companies' operating and administrative efficiencies and reduce its overall costs, without jeopardizing the emphasis on service quality. According to TDS, the date for completing the mergers is December 31, 1989, and a waiver of the Commission's Rules before then would allow it to synchronize the 14 TDS LECs' interstate and intrastate books to cover the same period.

7. TDS notes that in adopting the recommendation of the Federal-State Joint Board,[9] the Commission froze study area boundaries in order to prohibit companies from segregating high cost exchanges within their existing service territory as separate study areas in order to receive more high cost support. It reasons that a consolidation of study areas, by definition, does not cause a separate area to be created for artificially increased high cost support. Consequently, in the case of the consolidations of the TDS study areas presented in the petition, TDS maintains that the number of separate study areas would be shrinking and the ownership of the TDS LECs would remain the same before and after the merger. TDS concludes that there would be no change in high cost support for the 12 average schedule companies since neither the existing nor the proposed average schedule companies have or will be receiving high cost support. According to TDS, the merger of the 2 cost settlement companies will reduce total Universal Service Fund (USF) support.[10]

8. In requesting a waiver of Section 36.154(e)(1) and (2), TDS proposes that the new study area formed between Harlan and Fayetteville Telephone Companies be based on a 1990 base year SPF because that is the first year of operations for the combined entities. It proposes that the underlying data necessary for developing the new SPF be based upon existing data, 1983 for Fayetteville and 1988 for Harlan, corresponding to when each carrier

coverted from an average schedule to a cost based settlement. TDS anticipates a reduction in the high cost support for 1990 using the composite data of the two carriers.

III. DISCUSSION

9. We have considered the petitioner's arguments and conclude that TDS should be allowed to reconfigure its study area boundaries for the merged companies, to adjust the jurisdictional allocation factors for local loop plant for the new study area formed between Harlan and Fayetteville Telephone Companies, and to recast certain historical data necessary to reflect the new study area boundaries. Accordingly, we waive the definition of "study area" set forth in Part 36, Subpart H, and Sections 36.154(e)(1) and (2) of the Commission's Rules.

10. TDS requests a waiver of the definition of a study area as defined in Part 36, Subpart H of the Commission's Rules. It argues that this waiver is necessary because it is merging 14 TDS LECs into 6 new companies, thereby changing the related study area boundaries from 14 to 6. It maintains that this is not being done to increase high cost support areas, but to promote the public interest by improving operating and administrative efficiencies and reducing costs, without impairing the high quality of its services.

11. The Commission adopted the requirement that study area boundaries be frozen to prohibit companies "from setting up high cost exchanges within their existing service territory as separate companies to maximize high cost support."[11] In this case, the companies are being merged and the petitioner has indicated that there will be no increase in high cost support. In the case of the average schedule companies being merged, TDS states that the 12 TDS LECs involved do not currently receive USF support, and the new merged entities will not receive any USF funds. As for the proposed study area merger of Harlan and Fayetteville Telephone Companies, TDS anticipates that there will be a reduction in total USF support for 1990 of $2235. As a result, we believe that the proposed waiver of the study area definition is appropriate.

12. TDS also requests a waiver of Section 36.154(e)1 and (2) to the extent necessary to adjust the frozen interstate SPF for the Harlan and Fayetteville Telephone Companies. The merger of the these two Ohio telephone carriers involves 1925 subscriber lines. In addition, TDS proposes to use existing data to compute the 1990 base year SPF because that is the first year in which the combined companies will operate. TDS submits that the new combined SPF for the merged company will be .25428.[12] We believe that, in the aggregate, these revisions will have a minimal effect on the assignment of costs between the state and interstate jurisdictions, and that a grant of the waiver is justified.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 C.F.R. §154(i), That Telephone and Data Systems' petition for waiver of Sections 36.154(e)(1) and (2), and the definition of "study area" set forth in Part 36, Subpart H, of the Commission's Rules IS GRANTED.

14. IT IS FURTHER ORDERED, That this *Memorandum Opinion and Order* IS EFFECTIVE UPON ADOPTION.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] TDS filed on behalf of the following wholly owned carriers: Peoples Telephone Company, Fennimore Telephone Company, Dodge County Telephone Company, Rock River Telephone Company, Mosel & Centerville Telephone Company, Valders Telephone Company, Clayton Telephone Company, Hickory Telephone Company, Augusta Telephone Company, Wadesville Telephone Company, Poseyville Telephone Company, Elnora Telephone Company, Harlan Telephone Company and Fayetteville Telephone Company.

[2] TDS filed concurrently a separate petition for a blanket waiver of the rules discussed herein, so that if TDS desires to consolidate study areas in the future, it may do so without first obtaining Commission approval. Comments received in response to a *Public Notice* concerning that request will be addressed in a separate order.

[3] 47 C.F.R. Part 36, Subpart H, Glossary.

[4] 47 C.F.R. §§36.154(e)(1) and (2).

[5] TDS also requested a waiver of Section 36.125(f) of the Commission's Rules in its November 3, 1989 petition. By letter filed November 30, 1989, however, TDS stated that a waiver of Section 36.125(f) is not necessary. Consequently, this order does not address Section 36.125(f).

[6] A *Public Notice*, DA 89-1485 (released November 22, 1989), invited comments on this TDS waiver petition. No comments were received.

[7] The new base year SPF will be adjusted to reflect the transition prescribed by Section 36.154(f) of the Commission's Rules.

[8] An average schedule company is a company that does not conduct separations studies to develop its interstate costs. Instead, it is reimbursed for its interstate costs through payments computed by the National Exchange Carrier Association pursuant to Section 69.606 of the Commission's Rules, 47 C.F.R. §69.606.

[9] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (December 12, 1984) (*Joint Board Order*).

[10] In its Errata to Petition for Waivers of Telephone and Data Systems, Inc., filed on December 11, 1989, TDS states that "[i]n 1990, the Harlan and Fayetteville LECs would receive $6,802 and $46,744, respectively, in USF support. The calculation for the post-merger entity shows total USF support in 1990 to be $51,311. This represents a net reduction of $2,235 in USF support due to the merger."

[11] *Joint Board Order*, *supra*, at para. 65.

[12] In its Errata to Petition for Waivers of Telephone and Data Systems, Inc., filed on December 14, 1989, TDS indicates that the SPFs for Fayetteville Telephone Company for 1983 and Harlan Telephone Company for 1988, the first year each was a cost company, are .15026 and .36621, respectively.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMTEL CORPORATION, File No. E-87-38

Complainant,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,

Defendant.

MEMORANDUM OPINION AND ORDER

Adopted December 8, 1989; Released: December 13, 1989

By the Commission:

1. This matter is before us on remand, at our request, from the United States Court of Appeals for the Tenth Circuit.[1] In our prior order,[2] we denied Amtel's Application for Review of an order of the Chief, Common Carrier Bureau which granted Mountain States' Motion to Dismiss this matter. [3] We vacate our prior order and, for the reasons set forth below, we grant Amtel's Application for Review but deny its complaint on the merits.

I. BACKGROUND

2. In its complaint, Amtel alleged that Mountain States had improperly interpreted its Tariff F.C.C. No. 1, Sec. 6.7.7, relating to the calculation of access charges for interstate usage. That tariff provides that Mountain States will calculate certain access charges based on an assumed number of minutes if it does not have actual use figures. Because several end offices serving Amtel lacked equipment to measure actual minutes of usage, Mountain States applied the flat-rate surrogate to calculate Amtel's access charges in those offices. The sole argument in Amtel's complaint was that it was improper for Mountain States to interpret its tariff to say that the measurement capability had to exist in its end office. Amtel argued that if the customer's own equipment had measurement capability the customer should be allowed to provide the data for purposes of calculating access charges. In its Order, the Bureau dismissed Amtel's complaint on the ground that the issue it raised had been decided in the Commission's *Access Charge* decisions.[4]

II. AMTEL'S CONTENTIONS

3. Amtel asserts three reasons to reverse the Bureau's Order. It first claims that the Chief of the Common Carrier Bureau exceeded his delegated authority by acting on the issue presented by this complaint. Amtel also alleges that the Bureau Chief erred by misapplying or misinterpreting the Commission's policy on the use of assumed minutes for end offices with no measurement capability. It claims that this policy was based upon a concern that exchange carriers be appropriately compensated for the use of their facilities in congested end offices but it did not cover the small end offices at issue here where there simply is not enough traffic to approach the assumed usage level.

4. Finally, Amtel also contends that the Bureau Chief erred by not convening an evidentiary hearing before an administrative law judge prior to acting on its complaint. In support of this assertion, Amtel cites to the statement contained in paragraph 5 of the *Bureau Order*, "It is clear that no evidence has been presented in this proceeding to call this Commission precedent into question." Amtel claims that the Bureau erred because it was not afforded the opportunity to present such evidence in a hearing before an administrative law judge.

III. DISCUSSION

5. Our review of the *Access Charge* decisions and the arguments raised by Amtel in this proceeding leads us to conclude that Mountain States' interpretation and application of its tariff was reasonable and fully in accord with our existing access charge policy. Thus, we deny Amtel's complaint.

6. We find Mountain States' interpretation of its tariff reasonable. Mountain States developed the tariff in response to our rulings in the *Access Charge* proceeding. Our ultimate goal in that proceeding was to have all access charges computed on a time-used basis. This will be possible only when there is a universal measurement capability, which will happen as exchange carriers upgrade the equipment in their end offices.[5] Until then we have struck a balance that we believe is fair to both customers and carriers -- we have specified a surrogate number of minutes to be used for computing access charges if actual figures are not available. In considering this balance, we assumed, though we did not specifically require, that measurements for computing access charges would be done in the exchange carrier end office. For example, we stated:

> we have permitted exchange carriers without measurement capability in their end-offices to bill . . . on a flat-rate basis.

Fourth Reconsideration Order, 102 FCC 2d at 861. It is reasonable for Mountain States to make the same assumption in interpreting its tariff.

7. The Bureau correctly concluded that Mountain States' interpretation of its tariff was consistent with our access charge policies. We have permitted exchange carriers to use surrogate charges as a transitional measure. We made no exception for new entrants. In fact, we recognized that use of the flat-rate surrogate might disadvantage new entrants whose usage levels might not be as high as the assumed level, but concluded that "[a]ny

minimal disadvantage that new entrants might experience is outweighed by the administrative costs that carriers would be likely to incur." *Second Reconsideration*, 97 FCC 2d at 861-62.[6] Similarly, we made no exception for small end offices. We chose the flat-rate surrogate as an estimate of average usage in end offices without measurement capability. As such, it would make no sense to exclude some long distance carriers and/or end offices.

8. Amtel has not presented any persuasive reasons for permitting long distance carriers to provide their own measurements of minutes of use for calculating access charges in these circumstances. Amtel claims, for example, that use of the surrogate places it at a competitive disadvantage versus Mountain States. But, Amtel does not compete with Mountain States for interstate long distance service. In any event, we do not think it would be consistent with our flat-rate surrogate policy to permit any long distance carrier, at its option, to provide its own usage data. We chose the surrogate figure as an average for the industry so that, on balance, long distance carriers would not be overcharged and exchange carriers would not be under or overcompensated. If we were to permit long distance carriers to have the option to provide their own data, as Amtel suggests, presumably those below the average would provide data while those above would not. Such a policy could place the exchange carriers at financial risk. In addition, Amtel has presented no new information that alters our conclusion that use of the flat-rate surrogate poses only a minimal disadvantage for new entrants.[7]

9. As to Amtel's last contention, we find no error on the part of the Bureau Chief in not convening an evidentiary hearing before an administrative law judge. Despite Amtel's assertion in its Application for Review, the questions presented by Amtel's complaint were legal rather than factual.[8] It is clear that the parties had ample opportunity to submit written pleadings and to extensively brief the legal issues raised.[9] Amtel has not identified a single fact that was in controversy and which could lead to a finding in its favor. Section 208 does not require a trial-type hearing, and the Commission has broad discretion to forego such a hearing where it "has been provided with sufficient information upon which to base its decision such that the receipt of additional evidence would serve no useful purpose." *Department of Defense v. AT&T*, 80 FCC 2d 287, 290 (1980). Indeed, it is well established that even in a case where constitutional due process arguments are raised by the defendant, which is not the case here, if there is no material dispute as to the decisionally-significant facts and only the legal conclusions derived therefrom are contraverted, we have ample discretion to resolve these matters upon the basis of the evidence of record without resorting to time-consuming and costly evidentiary proceedings before an administrative law judge. *Northwestern Indiana Telephone Co. v. FCC*, 824 F.2d 1205, 1211 (D.C. Cir. 1987).

10. Accordingly, IT IS ORDERED that our previous order in this matter IS VACATED.

11. IT IS FURTHER ORDERED that Amtel's Application for Review IS GRANTED consistent with the above and DENIED in all other respects.

12. IT IS FURTHER ORDERED that Amtel's complaint IS DENIED on the merits.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Amtel Corporation v. FCC, No. 89-9519 (10th Cir. June 2, 1989).

[2] Amtel v. Mountain States Telephone and Telegraph Company, 4 FCC Rcd 2148 (1989).

[3] Amtel v. Mountain States Telephone and Telegraph Company, 3 FCC Rcd 3719 (1988)(*Bureau Order*).

[4] MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, Phase I, 93 FCC 2d 241 (1983), *modified on reconsideration*, 97 FCC 2d 682 (1983) (*First Reconsideration*), *modified on further reconsideration*, 97 FCC 2d 834 (1984) (*Second Reconsideration*), *aff'd and remanded in part sub nom.* NARUC v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985), *modified on further reconsideration*, 99 FCC 2d 708 (1984), 101 FCC 2d 1222 (1985) (*Third Reconsideration*), *aff'd on further reconsideration*, 102 FCC 2d 849 (1985) (*Fourth Reconsideration*), pet. for review denied sub nom. AT&T v. FCC, 832 F.2d 1285 (1987).

[5] We have not required exchange carriers to convert their end offices precipitantly. *Fourth Reconsideration Order*, 102 FCC 2d at 861. To do so could create a substantial burden on the companies and their ratepayers contrary to the public interest.

[6] We also note that long distance carriers whose minutes of use are below the assumed surrogate have an option of connecting in a nearby end office that has measurement capability and paying extra mileage charges for extension of service from that office.

[7] Because we here fully address Amtel's arguments on the merits, we need not, and do not, decide the question whether the Bureau Chief exceeded his delegated authority in this matter.

[8] Application for Review at p. 9.

[9] Amtel filed its complaint setting forth facts and legal arguments, to which Mountain States answered. Additional substantive pleadings included: Mountain States' Motion to Dismiss, Amtel's opposition thereto and Mountain States' Reply. Both parties filed separate legal briefs with Amtel also filing a reply brief. Counsel for both parties appeared before Bureau staff in a status conference pursuant to Section 1.732 of the Rules and subsequently participated with the staff in a telephone conference call.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. Nos. 1 and 2	Transmittal Nos. 1808, 1979, 1991
Revenue Volume Pricing Plan and Customer Specific Term Plan	

MEMORANDUM OPINION AND ORDER

Adopted: December 29, 1989; Released: December 29, 1989

By the Chief, Common Carrier Bureau:

1. On September 28, 1989, American Telephone and Telegraph Company (AT&T) filed the above-captioned transmittal to revise the tariffs for its Revenue Volume Pricing Plan (RVPP) and Customer Specific Term Plan (CSTP). These plans allow AT&T to offer discounts in 800 service to high volume customers, and to "aggregators," who agree to buy large blocks of discounted 800 service for resale to low volume end users.[1] On December 19 and December 22, respectively, AT&T filed Transmittal Nos. 1979 and 1991, describing an added service, clarifying language, and correcting certain figures in Transmittal 1808. AT&T also filed additional cost support material on December 22. MCI Telecommunications, Inc. (MCI), US Sprint Communications Company Limited Partnership (Sprint), and Mid Com Consultants, Inc. (Mid Com) filed petitions against Transmittal 1808.[2]

2. Currently, in order to be eligible for the discounts at the highest taper, RVPP and CSTP customers must commit to monthly usage levels of $3 million per month, and agree to pay penalties if usage does not equal or exceed this level. These AT&T transmittals make the discounts at the higher tapers available to customers with a minimum commitment level of $50,000. In addition, AT&T has redesigned the size and number of discount tapers in its RVPP. For CSTP, AT&T reduces the number of discount tapers from 18 to 3. The transmittals would allow customers using a minimum of $50,000 a month in 800 service to earn discounts of between 6 and 8 percent, depending on a time term of between one and three years.

3. MCI contends that the Commission is obligated to reject AT&T's tariff, because the revised rates fall below the lower limit of the applicable price cap band, which AT&T failed to justify with the average variable cost (AVC) data required by Section 61.49(d). MCI Petition at 2. Sprint alleges that AT&T's transmittal creates a new definition of "customer" which is internally inconsistent and illogical. Sprint Petition at 1-3. Sprint argues that AT&T's tariff is a "back door effort" to get approval for its aggregator arrangements by artificially classifying aggregators as customers. *Id.* at 3-4. Sprint also maintains that AT&T failed to show its below-band rates covered its AVC costs as required by Section 61.49(d). *Id.* at 5-7.

4. Mid Com, one of AT&T's aggregators, argues that AT&T's transmittal should be rejected because it would reduce Mid Com's profits after Mid Com agreed with AT&T to be an aggregator for three years. Mid Com alleges it is unfair to allow AT&T to change tariffs in a way that would reduce aggregators' revenue after the aggregators made a long term commitment to AT&T in reliance on AT&T's tariffs. Mid Com Petition at 5-7. Mid Com argues it is unfair to allow customers to be bound to their side of a bargain while the carrier is allowed to alter its side of the bargain through a tariff revision. [3]

5. Mid Com also alleges that AT&T's transmittal increases rates to high volume customers while maintaining current rates for low volume customers. Mid Com contends that this result is discriminatory. Mid Com asserts the tariff revision is a "price squeeze" in violation of antitrust law, which would increase wholesale rates to aggregators as AT&T enters into competition with the aggregators at the retail level. *Id.* at 14-19. Mid Com maintains that AT&T has monopoly power in the 800 service market because end users cannot change carriers without changing their 800 numbers. *Id.* at 18. Finally, Mid Com argues that AT&T supplied inadequate support data, and therefore the Commission will be unable to determine whether the revised rates meet price cap requirements. *Id.* at 19-22.

6. AT&T says that the long-run incremental cost (LRIC) cost data it supplied complies with Section 61.49(d), because it includes fixed and variable costs. AT&T also disputes Sprint's contention that its definition of "customer" is vague. AT&T Reply at 8. In reply to Mid Com, AT&T argues that Mid Com exaggerates the effects of its tariff revision, and asserts that Mid Com's costs would increase 0.9 percent. Further Reply at 6. AT&T also argues that Mid Com was on notice that AT&T could seek tariff revisions when it entered into the aggregator agreement. *Id.* at 7-8. AT&T also contends that its tariff cannot be discriminatory, because the revisions increase revenue and benefit end users. *Id.* at 9-10. It repeats that LRIC cost data satisfy the information requirements for filing a below-band rate, and disputes Mid Com's contention that AT&T did not adequately explain how it derived its data. *Id.* at 11-13. AT&T also denies that its tariff revision is a price squeeze, arguing that its tariff revision could be a price squeeze only if AT&T lowers its rates below Mid Com's rates. *Id.* at 13-15. Finally, AT&T contends that it has no legal duty to set its rates to maintain the discount margins available to Mid Com. *Id.* at 15-19.

7. The Common Carrier Bureau has reviewed AT&T's transmittals, its additional cost support material, the petitioner's pleadings, and AT&T's replies. We conclude that no compelling argument has been presented that the tariffs are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

8. Accordingly, IT IS ORDERED that the petitions to reject filed by MCI Telecommunications Corporation and US Sprint Communications Company Limited Partnership, and Mid Com Consultants ARE DENIED.

9. IT IS FURTHER ORDERED that the motion to accept late-filed pleading filed by AT&T Communications IS GRANTED.

10. IT IS FURTHER ORDERED that the petition for further deferral filed by Mid Com Consultants IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] At present, a 3 percent discount is available to customers with a minimum billing level of $50,000 per month. As monthly usage increases, so do the discounts. The highest discount is currently 9 percent for usage levels at $5 million per month or more. Under the revised language, customers spending between $25,000 and $100,000 would receive a discount of 4 percent (currently 3 percent). Customers spending between $100,000 and $250,000 would receive a discount of 5 percent (currently 4 percent). Customers spending over $250,000 would receive a 6 percent discount (currently 5 percent).

[2] Mid Com also filed, on December 26, 1989, a petition for further deferral. The Commission's Rules do not provide for petitions for further deferrals. Mid Com's petition is therefore dismissed.

[3] *Id.* at 13, (*citing* RCA American Communications, CC Docket No. 80-766, 84 FCC 2d 353 (1980)).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-43

In the Matter of

Amendment of Section 73.202(b), RM-6549
Table of Allotments,
FM Broadcast Stations.
(Aberdeen, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 14, 1989; Released: January 8, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 1813 (1989), issued at the request of Pioneer Broadcasting Company, Inc. (petitioner), proposing the substitution of Channel 284C for Channel 284C2 at Aberdeen, Washington, and the modification of its license for Station KDUX-FM at Aberdeen accordingly. In comments, petitioner states that it will be unable to upgrade Station KDUX(FM), as requested. Thus, petitioner requests that the Commission decline to amend the FM Table of Allotments to reflect Channel 284C.

2. Based on the aforementioned, we shall dismiss the proposal to allot Channel 284C to Aberdeen, Washington. Accordingly, IT IS ORDERED, That the petition by Pioneer Broadcasting Company, Inc., IS HEREBY DISMISSED, and that this proceeding IS TERMINATED.

3. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-617

In the Matter of

Amendment of Section 73.202(b), RM-6285
Table of Allotments,
FM Broadcast Stations.
(Tavernier, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 18, 1989; Released: January 8, 1990

By the Chief, Allocations Branch:

1. At the request of Linda U. Kulisky (petitioner), the Commission considers herein a petition for rule making seeking the allotment of Channel 296A to Tavernier, Florida, as that community's first local service. Petitioner states her intention to apply for the channel, if allotted.

2. An engineering analysis reveals that Channel 296A at Tavernier conflicts with a proposal to upgrade Station WISS(FM) on Channel 296C2 at Key West, Florida (RM-6234). Thus, we sought an alternate channel for Tavernier. As a result we have determined that Channel 254A can be allotted to Tavernier in compliance with the minimum distance separation requirements of the Commission's Rules.[1]

3. We believe the public interest would be served by proposing the allotment of Channel 245A to Tavernier, as its first local FM service. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Tavernier, Florida	--	245A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 1, 1990,** and reply comments on or before **March 16, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Linda U. Kulisky
Coral Harbour Club C-43
88181 U.S. Highway 1
Islamorada, FL 33036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 25-00-36 and West Longitude 80-31-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-616

In the Matter of

Amendment of Section 73.202(b), RM-7018
Table of Allotments,
FM Broadcast Stations.
(Panama City Beach, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 18, 1989; Released: January 8, 1990

By the Chief, Allocations Branch:

1. Winstanley Broadcasting, Inc., (petitioner), licensee of Station WPCF(FM), Channel 261A, Panama City Beach, Florida, has filed a petition for rule making requesting the substitution of Channel 261C3 for Channel 261A at Panama City Beach, and modification of its license for Station WPCF(FM) to specify the higher powered channel. Petitioner states its intention to apply for the channel, if allotted.

2. Channel 261C3 can be allotted to Panama City Beach in compliance with the Commission's minimum distance separation requirements with a site restriction of 15.5 kilometers (9.6 miles) southeast.[1]

3. As requested, we shall also propose to modify the license of Station WPCF(FM) to specify operation on Channel 261C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the higher powered channel at Panama City Beach or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties.

4. In view of the fact that Panama City Beach could receive a wide coverage area FM service the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Panama City Beach, Florida	261A, 286C2	261C3, 286C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 1, 1990,** and reply comments on or before **March 16, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Cary S. Tepper
Winstanley Broadcasting, Inc.
Putbrese, Hunsaker & Ruddy
6800 Fleetwood Road
P. O. Box 539
McLean, Virginia 22101
(Attorney for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 30-06-32 and West Longitude 85-39-56.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-615

In the Matter of

Amendment of Section 73.202(b), RM-6567
Table of Allotments,
FM Broadcast Stations.
(Summerland Key, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 18, 1989; Released: January 8, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Summerland Key Communications Partnership (petitioner), permittee of Station WPIK, Channel 275A, Summerland Key, Florida, seeking the substitution of Channel 273C2 for Channel 275A at Summerland Key, and the modification of its construction permit (BPH-860703MN) to specify operation on the higher class channel.

2. We believe the public interest would be served by proposing the substitution of Channel 273C2 for Channel 275A at Summerland Key, Florida. Channel 273C2 can be allotted to Summerland Key in compliance with the Commission's minimum distance separation requirements at the site authorized in the construction permit.[1] As requested, we shall also propose to modify petitioner's construction permit to specify operation on Channel 273C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the channel at Summerland Key or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

3. In view of the fact that Summerland Key could receive its first wide coverage FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Summerland Key, Florida	275A	273C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 1, 1990,** and reply comments on or before **March 16, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Martin E. Firestone
Mark N. Lipp
Mullins, Rhyne, Emmons & Topel, P.C.
1000 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20036
(Attorneys for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 24-40-05 and West Longitude 81-30-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-614

In the Matter of

Amendment of Section 73.202(b), RM-7136
Table of Allotments,
FM Broadcast Stations.
(Brookston and Monticello, Indiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 18, 1989; Released: January 8, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Nu-View Associates, Inc. (petitioner), licensee of Station WKJM(FM), Channel 237A, Monticello, Indiana, requesting the reallotment of its channel to Brookston, Indiana, and the modification of its license accordingly.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules.[1] In this regard, petitioner advises that the requested change to Brookston is mutually exclusive with the allotment of Channel 237A at Monticello, and that it does not intend to move from its present transmitter site.[2] Petitioner states that, operating from its present site with existing facilities, Station WKJM(FM) places a 70 dBu signal over the entire community of Brookston. Petitioner adds that Monticello (pop. 5,162) [3] has two FM stations whereas Brookston (pop. 1,709) has no local service. Thus, petitioner's proposal would bring a first local broadcast service to Brookston, and would not deprive Monticello of local service.[4]

3. A staff engineering analysis reveals that Channel 237A can be allotted to Brookston in conformity with the Commission's rules and regulations.[5]

4. We believe the public interest would be served by proposing to reallocate Channel 237A from Monticello to Brookston, Indiana, as requested. Therefore, we shall propose to modify Station WKJM(FM), as requested, to specify Brookston as its community of license. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Brookston.

5. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Brookston, Indiana	--	237A
Monticello, Indiana	237A, 299A	299A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **March 1, 1990,** and reply comments on or before **March 16, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Alan C. Campbell, Esq.
Dow, Lohnes & Albertson
1255 - 23d Street, N.W.
Suite 500
Washington, D.C. 20037

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] *See Report and Order,* MM Docket No. 88-526, 54 FR 26199, June 22, 1989; *recon. pend.*

[2] Coordinates at the licensed site of Station WKJM(FM) are 40-40-57 and 86-51-34.

[3] Population figures referenced herein were taken from the 1980 U.S. Census.

[4] Station WMRS(FM), Channel 299A is presently licensed to Monticello.

[5] Coordinates used in this determination are those at the licensed site of Station WMRS(FM), as indicated, *supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-613

In the Matter of

Amendment of Section 73.202(b), RM-7027
Table of Allotments,
FM Broadcast Stations.
(Seelyville, Indiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 18, 1989; Released: January 8, 1990

By the Chief, Allocations Branch:

1. A petition for rule making has been filed on behalf of Victory Christian Center (petitioner) seeking the allotment of FM Channel 240A to Seelyville, Indiana, as that community's first local broadcast service. Petitioner stated its intention to apply for the channel if allotted.

2. A staff engineering analysis reveals that Channel 240A can be allotted to Seelyville, Indiana, with a site restriction 2.0 kilometers (1.2 miles) west[1] to avoid short-spacing to Station WPZZ(FM), Channel 240A, Franklin, Indiana.[2]

3. In view of the fact that Seelyville could receive a first local broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Seelyville, Indiana	--	240A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 1, 1990,** and reply comments on or before **March 16, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Victory Christian Center
Attn: Larry G. Riley
Senior Pastor
9400 Wabash Avenue
Terre Haute, IN 47803

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates used for Channel 240A at Seelyville are 39-29-50 and 87-17-21.

[2] Coordinates at the licensed site of Station WPZZ(FM) are 39-30-49 and 86-04-07.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone & Telegraph
Company,
Complainant,

v. File No. E-88-21

Northwestern Bell Telephone
Company,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1989; Released: January 9, 1990

By the Commission:

I. INTRODUCTION

1. The primary question presented in this proceeding is whether a complainant/customer has a right under the Communications Act to recover damages if the complainant can establish that a carrier from whom it has purchased service has violated a valid rate of return prescription. We answer that question in the affirmative.

2. Complainant AT&T alleges that the defendant, Northwestern Bell Telephone Company (NWB), earned in excess of the rate of return prescribed by the Commission for the period from October 1, 1985 through December 31, 1986; thus, AT&T contends, NWB's rates were in violation of the prescription order and were unjust and unreasonable. AT&T claims it took interstate services during this period from NWB, paid the tariffed charges for such services, was damaged as a result, and, therefore, is entitled to reparations. We conclude that AT&T has met its burden of establishing that the defendant violated the Act and is liable to AT&T to the extent it can establish damages as a result of NWB's violation.

3. We begin with an account of the applicable statutory scheme and a brief overview of certain Commission orders and court decisions that preceded the filing of AT&T's complaint.

II. BACKGROUND

4. The Communications Act of 1934 (the Act) grants the Commission a mandate to regulate "so as to make available . . . efficient, Nation-wide, . . . communications service, with adequate facilities at reasonable charges...."[1] Title II of the Act requires that carriers' rates for communications services be just, reasonable, and non-discriminatory.[2]

5. The Act provides the Commission with various tools to fulfill its regulatory functions. Some of these tools give us the means to affect rates indirectly, such as by prescribing a carrier's accounting system and depreciation rates, [3] or controlling its entry into or exit from the interstate market.[4] Other provisions of the Act are connected more directly with the ratemaking process. Section 203 authorizes us to determine the information that must accompany a carrier's tariff filings, while Section 204 empowers us to investigate the lawfulness of proposed rates and, pending hearing, suspend the effectiveness of those rates for up to five months.[5] Section 205 of the Act also grants us the authority, after a full opportunity for hearing, "to determine and prescribe" just and reasonable rates or practices "to be thereafter observed."[6]

6. The statute provides the Commission broad authority to effectuate its provisions and to penalize those who violate them. Section 4(i) states that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of its functions."[7] Title V contains provisions authorizing the levying of fines and forfeitures.[8]

7. The Act also expressly provides private parties a right to file a complaint against carriers and obtain reparations if the party can establish that a carrier has violated the Act and the party has been damaged as a result of such violation. Specifically, the Act states that "any person" may petition the Commission in complaint of "anything done or omitted to be done" by any carrier in contravention of the Act, and that carriers shall be liable "for the full amount of damages sustained in consequence of any such violation." The Commission has a duty to investigate a complaint "in such manner and by such means as it shall deem proper." If the Commission finds that the complainant is entitled to an award of damages, the Commission has authority to order the carrier to pay the complaining party the sum to which it is entitled.[9]

8. In 1972, the Commission, in an effort to carry out its responsibilities in a more effective and expeditious manner, asserted the authority to prescribe the rate of return a carrier may earn. That authority was upheld in 1975 by the U.S. Court of Appeals for the District of Columbia Circuit and has not been questioned elsewhere.[10]

9. Prior to 1984, the Commission exercised this authority to prescribe a rate of return for a single entity: the Bell System.[11] As a result of the telecommunications industry's structure at that time, the regulatory effect of this single prescription rippled throughout the industry as a whole.[12] The subsequent Bell System divestiture and the concurrent development of the access charge system altered the industry's structure fundamentally,[13] and created the prospect of having to prescribe a rate of return not just for a single entity, but for all eight entities that emerged after divestiture (*i.e.*, AT&T and the seven Regional Bell Holding Companies) and approximately 1400 other local exchange carriers as well.

10. Faced with this prospect, the Commission adopted, in a broad Rule Making proceeding: (1) methodologies to be used to prescribe maximum rates of return for AT&T and local exchange carriers; (2) procedures for represcribing rates of return on a regular basis; (3) a system of monitoring carriers' earnings; and (4) a requirement that overearnings be refunded, either directly to those who had paid rates that produced the overearnings, or pursuant to automatic, prospective adjustments to tariff rates.[14] In keeping with its traditional approach to prescribing rates of return, the Commission established both an authorized return and a "spread" or "buffer" above that return for use in proceedings relating to the enforce-

ment of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return "to determine whether a rate of return prescription has been violated."[15] The Commission also defined particular time periods for measuring compliance with the prescribed return. Consistent with its traditional practice, the Commission did not prescribe a minimum rate of return.[16]

11. The Commission determined that it would review earnings on an overall basis, and on three categories of access charge rate elements: special, common line, and switched traffic sensitive. The Commission acknowledged that reviewing earnings in this manner might require a carrier to refund excessive earnings in one category even though its overall return was not excessive. The Commission determined, however, that such a review would not be unfair to carriers because of the safeguards built into its plan. These safeguards included a long evaluation period, the aggregation of access elements into three categories, the freedom afforded carriers to select the geographic level at which their rates would be tariffed, and the creation of the "spread" or "buffer" above the authorized return. The Commission noted that each of these safeguards would provide carriers flexibility to offset earnings "peaks" and "valleys," and thereby provide them a reasonable opportunity to achieve their allowed return.[17]

12 Reviewing earnings on a categorical basis also furthered the public interest, the Commission determined, by helping to prevent discrimination among the users of access services.[18] The Commission stated:

> Our obligation is to provide carriers a reasonable opportunity to achieve their authorized return. That opportunity, however, is not unlimited; we are bound by the Communications Act to ensure that rates are just and reasonable, and do not produce unreasonable discrimination or undue preferences. [Reviewing earnings on a categorical basis helps] to accomplish that goal by not allowing a carrier to offset excessive rates to one customer with deficient rates to another. A carrier is still afforded the opportunity to achieve its overall return, it simply must do so in a non-discriminatory manner.[19]

13. During the 15 month time period at issue in the instant complaints, local exchange carriers, including the defendant, were required to file rates calculated to earn a 12.75 percent return.[20] Because the initial review period would be 15 months, rather than two years, as would be followed thereafter, the Commission expanded the "buffer" that would be used during this initial period to determine whether the prescription had been violated.[21] Thus, carriers were given notice that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate earnings during this period and 13.25 percent would be the maximum allowable rate of return for any access service category.[22]

14. In January 1988, the U.S. Court of Appeals for the District of Columbia Circuit set aside the automatic refund mechanism as arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce."[23] The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription."[24]

15. Against this background, we turn to the pleadings of the parties.

III. PLEADINGS OF THE PARTIES

16. On September 30, 1987, AT&T filed a formal complaint against NWB.[25] The complaint alleged that NWB violated this Commission's prescribed rate of return during the period from October 1, 1985 through December 31, 1986, thereby violating the prescription order and making the rates AT&T paid NWB during this period unjust and unreasonable in violation of Section 201(b) of the Act. AT&T supported its allegations with evidence in the form of reports filed with this Commission by the defendant for the 15 month period at issue. The reports show that the defendant achieved earnings in excess of this Commission's prescribed rate of return on interstate access overall, *i.e.*, on the combined returns for the three interstate access service categories established by this Commission for purposes of enforcing its rate of return prescription.[26]

17. Pursuant to Sections 206 through 209 of the Act, AT&T requested that this Commission declare the defendant's charges for the period from October 1, 1985 through December 31, 1986 to be in violation of the rate of return prescription and Section 201(b) of the Act. AT&T also requested that the defendant be ordered to pay damages to AT&T equal to the difference between the amount it actually paid for interstate access service during that period and the amount it would have paid if the defendant's charges had earned no more than the maximum allowable rate of return, plus interest on this amount from January 1, 1987 at the rate specified by this Commission in the Docket 84-800 proceeding.

18. NWB filed an answer and motion to dismiss in which it claims that AT&T has failed to state a cause of action upon which relief may be granted. NWB admits it filed monitoring reports, and it admits to the specific recitations of the earned interstate rate of return cited by AT&T. NWB contends, however, that the rates paid by AT&T were paid in conformity with lawfully filed tariffs that were calculated to produce the Commission's prescribed rate of return. NWB argues that there is no authority for the proposition that a carrier's rates are unjust and unreasonable, for purposes of establishing a violation sufficient to sustain a cause of action under the Act, simply because the end result of lawful rates is that they produce earnings in excess of the Commission's prescription. NWB further contends that AT&T's claim for damages is nothing more than a claim for automatic refunds, which the Court of Appeals for the District of Columbia found unlawful in *AT & T v. FCC*. Finally, NWB asserts that a portion of AT&T's claim is barred by the statute of limitations contained in Section 415 of the Act, 47 U.S.C. § 415. To the extent that the Commission upholds AT&T's complaint, NWB claims in a contingent cross-complaint that it is entitled to restitution from AT&T for those access elements on which NWB underearned.

19. AT&T filed an opposition to NWB's motion to dismiss and a motion to dismiss NWB's contingent cross-complaint. In response to the defendant's contention that the complaint is legally deficient, AT&T states that the court in *Nader v. FCC*[27] and *New England Telephone*[28]

established that earnings in excess of a prescribed maximum overall rate of return are unlawful under the Act and give rise to a cause of action for such violation. AT&T acknowledges that the court in *AT & T v. FCC* invalidated the Commission's automatic refund scheme, but argues that NWB's reliance on that case is misplaced because the Court left undisturbed the Commission's authority to establish and enforce a maximum rate of return on interstate access. AT&T also disputes defendant's claim that the complaint is barred by the statute of limitations. Finally, AT&T contends that the defendant's contingent cross-complaint is legally insufficient and should be dismissed as an unauthorized pleading.

20. On July 27, 1989, the Chief, Common Carrier Bureau (Bureau), issued an "Order to Show Cause" to the defendant directing it to show cause why the Commission should not order the payment of damages sought by the complainant.[29] The Bureau concluded that, based on the record before it, the complainant had made a *prima facie* case of a violation of the Communications Act for which damages may lie, and that NWB's answer and motion to dismiss provided no basis for denying AT&T the relief sought in its complaint. The Bureau noted that NWB's own rate of return monitoring filing indicated its earnings exceeded the Commission's prescription, which was enough to make out a *prima facie* case of a Communications Act violation sufficient to support a Section 208 complaint. The Bureau stated that, although the record at that time arguably provided a legally adequate basis to support Commission action, NWB would be provided an additional opportunity to show cause why damages should not be awarded to AT&T. The defendant also was directed to provide a calculation of such damages for each service as alleged in the complaint.[30]

21. NWB filed a response to the show cause order on August 16, 1989. In its response, NWB argued that the statutory scheme of the Communications Act does not provide for the payment of reparations based upon profits earned under a lawfully filed and effective tariff; therefore, NWB claimed, AT&T's complaint fails to state a *prima facie* case under Section 208 of the Act. According to NWB, a "tariffed rate's reasonableness or lawfulness cannot be judged solely on a post-hoc review of profitability" and "[r]eturns that slightly exceed [a target return] have never and should not be deemed unjust."[31] NWB argued further that implicit in the holding of the Court in *AT & T v. FCC* is the principle that an individual service rate is neither unjust or unreasonable simply because it produces a service-specific rate of return above the overall rate of return established by the ratemaking agency.[32] In any event, NWB contends, no violation occurred because the subject rates, which were developed in accordance with the Commission's rules, were targeted to the authorized rate of return when they were filed and were subject to the Commission's intense tariff review process prior to taking effect.[33] NWB states that it is well established law that variations between forecasts and actual results do not establish any basis for retroactive relief as demanded by AT&T "[e]ven if 'the Commission determines that existing rates were excessive . . . .'"[34]

22. The defendant then argued that even if exceeding a prescribed rate of return could support a complaint under Section 208 of the Communications Act, such overearnings would have to have occurred at the corporate level at which investments are made in the business of the carrier. NWB claimed that the Court in *AT&T v. FCC* established that no refund obligation or complaint liability could attach to any company until the overall earnings for all affiliated companies are beyond the prescribed maximum rate of return. Thus, according to NWB, AT&T's complaint failed to state a valid cause of action since it did not and could not allege that the overall 1985 - 1986 interstate access service rate of return for the US West Operating Companies as a whole was excessive. NWB also contended that during the period covered by AT&T's complaint, AT&T realized the advantage of the lower than authorized rates of return experienced by US West operating companies other than NWB. According to NWB, the US West Companies earned in the aggregate a return of 12.63 percent, below the Commission's prescribed level. Therefore, NWB argued, if this Commission "permits AT&T to reap the advantages of the 'valleys' associated with [US West's] underearnings, while returning to them as damages the 'peaks' associated with NWB's alleged overearnings, [US West's] overall rate of return would be reduced to 12.63 percent -- a full 12 basis points below that prescribed by the Commission."[35] NWB asserts that such an outcome is expressly precluded by *AT & T v. FCC*.

23. NWB also raised a number of procedural challenges to the Bureau's show cause order. First, NWB claimed that the Bureau exceeded its lawful delegated authority in issuing the show cause order. According to NWB, the Bureau has no authority to adjudicate formal complaints, at least beyond dealing with facially defective complaints under the Commission's Rules.[36] Second, NWB claimed that formal complaints such as AT&T's must be designated for hearing under Section 0.291(e) of the Commission's Rules.[37] In a related argument, NWB asserted that the Bureau could not properly have taken any action with respect to AT&T's complaint because it presents novel questions of law, and the Bureau has no delegated authority to resolve questions of this nature.

24. NWB further contends that the Bureau improperly shifted the burden of proof by requiring it rather than AT&T to demonstrate that the rates for the period in question were unjust and unreasonable.[38] NWB argues that by adopting AT&T's theory of the case and requiring it to compute AT&T's damages, the Bureau effectively denied NWB constitutional due process.

25. Finally, the defendant argues that AT&T's claims for damages are partially barred by the two year statute of limitations contained in Section 415 of the Communications Act.[39] The crux of the defendant's argument is that the Bureau's conclusion regarding the effect of the statute of limitations is based on the erroneous conclusion that AT&T has established a *prima facie* case of a Communications Act violation. NWB contends that since the Communications Act requires a complainant to demonstrate such a violation by pleading and proving unjust and unreasonable rates -- something NWB claims AT&T could have and should have attempted closer to the time the rates were filed -- it follows that at least a portion of AT&T's complaint is time barred.[40]

26. In its reply to defendant's response, AT&T argues that contrary to NWB's assertions, the Court's decision in *New England Telephone* clearly establishes that earnings in excess of the prescribed maximum overall rate of return are unlawful.[41] AT&T further claims that the court in *AT&T v. FCC* specifically recognized the availability of the complaint procedure to remedy violations of the Commission's rate of return prescription.[42] AT&T states

that NWB's contention that all US West subsidiaries should be treated as a single carrier for purposes of enforcing the Commission's rate of return prescription order is equally untenable. AT&T maintains that it is NWB -- the carrier that charged the rates at issue -- which is the only relevant entity for establishing and remedying a violation of the Commission's rate of return prescription. As for defendant's claim that the Bureau overstepped its delegated authority in issuing the show cause order, AT&T states that Bureau's authority to act as it did in this matter is firmly established in Sections 0.91 and 0.291 of the Commission's Rules.[43] Finally, AT&T states that NWB is wrong in claiming that AT&T's complaint presents novel questions of law. On the contrary, AT&T states, any legal questions raised in its complaint have long been settled by the Commission and the Courts; thus, the Bureau was acting within its delegated authority in addressing such questions in the show cause order.[44]

IV. DISCUSSION

27. On the basis of our examination of the record, we conclude that complainant AT&T has proven that defendant NWB violated the Communications Act and is liable to AT&T to the extent it can establish that it was damaged thereby.[45]

28. The Communications Act grants private parties a right to file complaints against carriers and authorizes the FCC to award damages, 47 U.S.C. §§ 206, 208-209, and AT&T filed its complaints against the defendant pursuant to these provisions. Under our rules, all that is required to make out a *prima facie* case in a complaint proceeding is a filing containing "facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation . . . ."[46]

29. The case AT&T presents is straightforward. The action it alleges the defendant has "done or omitted to be done" in contravention of the Act, 47 U.S.C. § 208, is to achieve earnings in excess of the Commission's order prescribing a rate of return applicable to the defendant, thereby violating the prescription order and making the rates AT&T paid unjustly and unreasonably high in violation of Section 201(b) of the Act. In support of its allegations, AT&T offered evidence in the form of monitoring reports filed with this Commission by the defendant which show that it earned returns on a overall interstate access basis in excess of the 13.10 percent allowable return provided for in this Commission's rules. AT&T contends that it was damaged as a result of paying the defendant's rates.

30. NWB alleges that AT&T's complaint does not make out a *prima facie* case. The defendant does not dispute that this Commission prescribed a rate of return. Indeed, it affirmatively presents selected aspects of that prescription as a defense to AT&T's claims.[47] It admits that the report it prepared and filed with this Commission show overall access earnings in excess of 13.10 percent. Thus, there are no disputed material facts in the record going to liability.[48]

31. NWB argues that judgment cannot be entered for AT&T for reasons that fall into three general categories. The first contains arguments that earning in excess of a rate of return prescription is not a violation of the Act or any valid Commission rule or order; and, even if such action could be considered a violation, it could occur only if the return was exceeded by the company "overall," which NWB defines as at the level of its parent holding company, US West. Included in this first category is the argument that a carrier cannot violate the Act by charging the rates in its tariff. Category two contains claims that AT&T's complaint is barred by the statute of limitations. In the third category are arguments that NWB's due process rights have been violated by the Common Carrier Bureau's order to show cause. We discuss each category, in turn, below.

A. Violation of the Act

32. NWB argues that AT&T's complaint is invalid because an award of the damages it seeks would constitute retroactive ratemaking.[49] NWB claims that the rates at issue were targeted to the authorized rate of return when they were filed and were subject to the Commission's tariff review process. NWB states that those legally filed rates may not now be subjected to retroactive adjustments through an award of refunds or damages. Defendant contends that AT&T could have and should have challenged the subject rates during the tariff review process and can not properly do so at this time. The defendant states that the "notion that a carrier could violate the Communications Act by charging the amounts specified in its tariffs would appear ludicrous on its face."[50]

33. The broadest argument presented by NWB is the claim that earnings in excess of the Commission's prescribed return cannot establish a violation of the Act because "the statute *never* mentions 'excessive returns' - - it requires a complainant to demonstrate a violation of the Act and the Act only speaks of ' *rates*, ' not 'returns.'"[51] In support of its additional claim that high profits do not necessarily establish that a rate is unjust and unreasonable, NWB quotes a number of different authorities. These include the Commission's statement in its order adopting the prescription: "'returns that slightly exceed . . . a target [return] have never been and should not be deemed unjust.'"[52]

34. The next argument advanced by NWB is its claim that AT&T's complaint cannot lie given the Court's ruling in *AT & T v. FCC* striking down the Commission's automatic refund mechanism. According to defendant, the holding in *AT & T v. FCC* rejects the notion that a private cause of action for damages exists where a carrier's lawfully filed tariffs earned returns in excess of the Commission's prescribed levels. NWB argues that even if earnings in excess of a prescribed rate of return could establish a cause of action under the Act, the holding in *AT & T v. FCC* requires this Commission to consider a carrier's underearnings in determining whether particular overearnings are in violation of the Act.[53] The crux of this "peaks and valleys argument" as presented by defendant is that overearnings would have to occur at the corporate level at which investments are made in the business of the carrier (in this case, the parent holding company or US West, Inc. level) in order to state a cognizable claim under the Act. NWB asserts that because the aggregate earnings of the three US West Operating Companies[54] were below the prescribed level for the 15 month period at issue, AT&T's complaint fails to state a cause of action.

35. After careful consideration of the pleadings, we conclude that the defendant's arguments have no merit.

36. NWB provided no support for its contention that a carrier cannot be found to have violated the Act by charging the rates in its tariff. Contrary to this assertion,

however, legally effective, carrier-initiated tariffs can always be challenged as unreasonable and unlawful. As the Supreme Court has stated:

> In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the *legal* rates, that is, those which must be charged to all shippers alike.
>
> Although the Act thus created a legal rate, it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate - it was lawful only if it was reasonable . . . .[The] shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation.[55]

37. Moreover, the defendant, in claiming that high profits do not necessarily mean a rate is unreasonable, misses the point. The issue in this proceeding is not whether high profits in the abstract are unlawful, but whether profits in excess of a prescription are unlawful. NWB invokes and relies upon the Commission's statement that "returns that slightly exceed a target [return] . . . have never been and should not be deemed unjust." That statement is not helpful to NWB, however, because it is part of the explanation of the rationale for establishing, above the targetting return, a buffer that would be used to determine whether a prescribed return had been violated. AT&T has taken that buffer into account in filing its complaints. In context, the statement stands for the proposition that carrier earnings over and above the buffer -- like those NWB has admitted to during the period covered by AT&T's complaints -- are unlawful.

38. The defendant's arguments would be persuasive only if one assumed that a rate of return prescription requires carriers to target their rates at that level but has no meaning in relation to the actual performance of those rates. This assumption conflicts with settled law.

39. The Commission has authority under the Communications Act to prescribe carriers' rates of return.[56] In upholding this authority, the D.C. Circuit determined that rate of return prescriptions are a valid exercise of the Commission's authority under Sections 4(i) and 205 of the Act, and that such prescriptions are "necessary for the Commission to carry out its [ratemaking] functions in an expeditious manner."[57]

40. The prescription of a rate of return establishes a requirement more far-reaching than merely that it be used in the development of a carrier's rates.[58] As the court in *Nader* explained, a rate of return prescription, like any other Section 205 prescription, is binding: it limits the utility prospectively.[59] Subsequent to the *Nader* decision, the binding effect of such a prescription was reaffirmed by the D.C. Circuit in *New England Telephone*. In its opinion in that case, the court emphasized that an order setting a maximum rate of return is "a valid Section 205 prescription" having the "force of statute . . . . The carrier . . .is bound to conform."[60] In addressing the targetting argument directly, the court stated:

> Petitioners . . . contend that the nature of their obligation was merely to try in good faith to formulate rates that would not produce an excessive return. In the Commission's view, by contrast, the prescription imposed a maximum return that the carriers could not exceed, however innocently . . . .
>
> The idea of a prescription under Section 205 is that the agency has proclaimed that a certain situation . . . is unlawful and *shall not occur*. Certainly carriers cannot intentionally try to violate an outstanding prescription, but that does not mean that they may achieve through inadvertance what they were forbidden from doing by design.[61]

41. Contrary to NWB's assertions, the case law supports AT&T's argument that the enforcement of a rate of return prescription does not violate the rule against retroactive ratemaking for a simple reason: the obligation being enforced was set prospectively when the prescription was adopted. The defendant dismisses the *New England Telephone* case as a departure from otherwise long-standing precedent.[62] But none of the decisions cited by the defendant supports a contrary view. With one exception, none of those decisions involved an existing, prospectively defined prescription. The exception, *AT & T v. FCC*, also provides no support for NWB's claims about retroactive ratemaking or the limited reach of rate of return prescriptions. The court in *AT & T v. FCC* explicitly acknowledged this Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription.[63]

42. We also are not persuaded by the defendant's other claims that the holding in *AT & T v. FCC* controls these proceedings and bars judgment for AT&T. In that case, the court determined that the remedy component of this Commission's rate of return prescription -- the automatic refund mechanism -- was unlawful. The defendant argues that in striking down a remedy conceived by this Commission and based on its authority under Sections 4(i) and 205, the D.C. Circuit also invalidated private actions for damages conceived by Congress and expressly provided for in Sections 206 through 209 of the Act. This argument finds no support in the court's opinion.

43. The opinion of the court distinguishes the automatic refund mechanism from the prescription as a whole, finding only the former invalid.[64] That mechanism plays no role in these complaint proceedings. Moreover, the automatic refund mechanism and private actions for damages are distinctly different from each other. The automatic refund mechanism resulted from a Rule Making initiated at the Commission's discretion. In contrast, private actions for damages were established by Congress as part of the Act. They do not operate automatically, nor are complainants members of a class of customers defined by the Commission. Complainants do not seek the benefit of a future rate reduction, as the automatic refund mechanism provided. Each complaint must be initiated by a private party seeking damages for an injury *to itself*, and that party carries the burden of establishing both a violation of the Act and the actual injury.[65] If a complainant meets this burden, the Act expressly authorizes the Commission to order the carrier to pay damages.[66]

44. Moreover, NWB does not offer a plausible basis for reading the opinion in *AT & T v. FCC* as it suggests. Although NWB invokes the case in support of a broad constitutional claim that the Commission must take

NWB's parent holding company's underearnings into account when considering private actions for damages resulting from earnings in excess of a prescription, the court explicitly declined to base its decision on constitutional grounds. [67] The court's discussion of constitutional issues appears in a portion of the opinion separate from the holding, and consists of "guidance" offered "in case the Commission chooses to reformulate the refund rule."[68]

45. In any case, the Constitution does not require the Commission to balance the excessive earnings of one telephone company against the underearnings of that company's affiliates when considering a complaint seeking damages for violation of a rate of return prescription adopted with respect to that particular company. The implication of the defendant's claim is that it is entitled, as a constitutional matter, to charge its customers excessive rates as long its earnings can be offset by an affiliate's earnings shortfall; in other words, that the US West Companies are entitled to cross-subsidize. This clearly is not the case. The prevention of cross-subsidization has long been recognized as a lawful objective of rate regulation.[69] Regulatory agencies have the authority, indeed the duty, to protect ratepayers from such exploitation.[70]

46. Courts have made clear that carriers assume the risk of both losses for services they underprice and the prospect of returning amounts realized through rates that are unjustly and unreasonably high.[71] The case law also indicates that a carrier may be required to make whole those who have been injured by discrimination and cross-subsidized rate structures without regard to whether the carrier itself has achieved its authorized return overall.[72]

47. It does not disturb the balance of ratepayer and shareholder interests embodied in the Act to award damages to customers who demonstrate that they were injured by paying rates that resulted in a carrier earning in excess of its prescribed return. Under the Act, carriers have substantial flexibility in formulating rates.[73] Indeed, our rules permit companies to choose the level of geographic aggregation for purposes of developing and tariffing their rates, as well as for reporting their earnings on such rates.[74] NWB could have chosen to develop its rates together with its affiliated US West Companies but did not exercise its option to do so. Having chosen to file rates specifically tailored to its own revenue requirement, and thereby choosing to subject itself to a separate rate of return constraint, NWB cannot now be permitted to evade that constraint and force its customers to bear the burden of unlawful rates.

48. Furthermore, carriers are permitted to make mid-course corrections if their actual return deviates from the authorized return. If actual earnings are higher than the authorized return, a carrier can file reductions and thereby avoid the risk of being ordered to pay damages. If actual earnings are below the authorized return, a carrier can file rate increases. NWB had ample notice of our rules, which were developed in notice and comment Rule Making proceedings in which it participated, as well as the level of the prescription. As a general matter, it would be inequitable to permit NWB, who was in the best position to set its rates at lawful levels in the first place, and who later had opportunities to correct those rates, to avoid responsibility for those unlawful rates, at the expense of its customers.

49. The holding in *AT & T v. FCC* does not support the defendant's sweeping constitutional claims. In striking down the automatic refund rule, the court explicitly stated that its holding did not rest on a constitutional foundation. The court also acknowledged that the Commission's rate of return prescriptions bind a carrier prospectively and are enforceable. The court's opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein. For these reasons, we find that AT&T has demonstrated adequately that a valid prescription bound NWB to a maximum earnings limitation. As noted previously, NWB admits that it earned in excess of that amount during the period in question.

B. ***Statute of Limitations***

50. NWB makes two claims with regard to the statute of limitations. The first is that it is immaterial when a complainant learns of the fact that a carrier has exceeded a prescribed rate of return because such earnings are not sufficient to establish a *prima facie* case of unlawfulness under the Communications Act.[75] This claim cannot stand in view of our previous determination that violating a rate of return prescription does, indeed, constitute a violation of the Act.

51. NWB's second claim is that all or a portion of AT&T's claim is barred by Section 415 of the Act, which establishes a two year statute of limitations on the filing of complaints.[76] Under this reasoning, AT&T's claim is barred at least for rates paid prior to two years from the date on which it filed its complaint.

52. This argument is not persuasive. The purpose of Section 415 is to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed.[77] The statute does not begin to run, however, until discovery of the right or wrong or of the facts on which such knowledge is chargeable in law.[78] Here, the defendant filed a rate of return monitoring report which, as previously noted, was developed by the Commission for several purposes, including making information about carrier earnings publically available. Moreover, the monitoring report relied on by AT&T in its complaint was specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.[79] Under these circumstances, Section 415 poses no bar to AT&T's complaint.

C. ***The Bureau's Show Cause Orders***

53. NWB presents several arguments in support of its claim that the Common Carrier Bureau overstepped its delegated authority in issuing a show cause order. These claims rest on the assumption that the Bureau has no authority to act in complaint proceedings in this manner. This assumption is incorrect.

54. The general authority of the Bureau with respect to the adjudication of Section 208 complaints is firmly established in Sections 0.91 and 0.291 of the Commission's Rules.[80] Section 0.291 expressly delegates to the Chief of the Common Carrier Bureau the "authority to perform all functions of the Bureau, described in Section 0.91" unless otherwise specifically limited. Section 0.91(a) empowers the Bureau to act "for the Commission under delegated authority, in matters pertaining to the regulation and licensing of communications common carriers," which encompass " *adjudicatory* and Rule Making proceedings, including *rate* and service investigations [and] determinations regarding *lawfulness of carrier tariffs*. "

(Emphasis added.) Because Section 0.91 plainly includes the authority to act for the Commission in connection with a Section 208 complaint, there can be no question under these rules of the Bureau's authority to issue the show cause orders.[81]

55. The Bureau's delegated authority under Part 0 of our Rules must, of course, be consistent with the Communications Act. The Bureau's delegated authority to act in complaint proceedings has been affected by 1988 amendments to Section 5(c)(1) of the Communications Act, but not in any way related to the action complained of by NWB. These amendments reserve to the Commission the authority to adjudicate certain Section 208 complaints.[82] The show cause order, however, does not purport to be a determination of unlawfulness or liability as to any aspect of AT&T's complaint; rather, the order to show cause is, by its very nature, interlocutory. It is nothing other than a lawful attempt by the Bureau to facilitate the Commission's ability to issue a decision on the merits in this complaint proceeding within the statutory timeframe.[83]

56. NWB's argument that the Bureau could not properly take any action with respect to the instant complaints because they present "novel questions of law" is equally unavailing. It is unnecessary to decide in this proceeding whether the Bureau has authority to consider such questions because no novel questions were addressed in the Bureau's orders. The Commission's authority to prescribe a common carrier's rate of return is well-established.[84] In addition, the Court of Appeals in *AT & T v. FCC* and *New England Telephone* specifically recognized the right to a statutory remedy when a carrier's interstate earnings have exceeded the maximum rate of return prescribed by the Commission.[85] It is clear that any question regarding the authority of the Commission to enforce a valid rate of return prescription has long been settled by the Commission and the courts. Thus, it cannot be said that the Bureau considered "novel" questions of law. Moreover, this issue is moot in view of our actions in this order, which is not a reconsideration of the Bureau's order but is, instead, a determination by the Commission on the record of this proceeding.

57. NWB also claims that the Bureau improperly shifted the burden of proof by requiring NWB to submit calculations of the amount of overearnings attributable to rates paid by AT&T, and that due process and the Administrative Procedure Act require that AT&T's complaint be set down for hearing before an administrative law judge.

58. NWB has provided no persuasive authority in support of the claim that it is entitled automatically to a hearing before an administrative law judge to resolve questions concerning damages. Section 208 of the Act does not mandate any particular form of procedure in complaint cases. When Section 208 is construed in conjunction with the Act's general procedural authorization in Section 154(j), it is abundantly clear that the decision of when trial-type hearings are necessary under Section 208 is one which lies within the discretion of the Commission, or by the Bureau pursuant to delegated authority.[86] With respect to constitutional due process, there are no material disputed questions of fact at this stage of these proceedings; the issues are legal, not factual, in nature.[87]

59. Moreover, while we agree with NWB's assertion that AT&T bears the burden of proof in these proceedings, we reject the claim that NWB cannot be ordered in a complaint proceeding to provide evidence bearing on the amount of damages. It is well settled that a defendant in a complaint proceeding may be required to produce such evidence where the complainant has made a *prima facie* showing of a violation and where the relevant information for measuring actual injury is solely within the possession or control of the defendant.[88]

60. It is not necessary, however, to resolve the question whether the Bureau was acting lawfully by ordering NWB to produce evidence bearing on damages relating to AT&T's complaint, or any other question raised by NWB or AT&T regarding damages. AT&T's complaint contains allegations that identify with reasonable certainty the amount of damages for which recovery is sought. In this order, we do no more than render judgment for AT&T on issues concerning liability. We find that NWB has earned in excess of a valid rate of return prescription, thereby violating the prescription orders and making its rates unjust and unreasonable under Section 201 of the Communications Act. Therefore, NWB is liable for such damages as AT&T can demonstrate. As discussed *supra*, we are providing AT&T an opportunity to file a separate complaint to plead and prove such damages. We will, therefore, reserve judgment on damage issues until both the complainant and the defendant have the opportunity to address these issues and establish a full record on which we can base a judgment. Pursuant to this determination and in accordance with our rules, AT&T is entitled, within 60 days after public notice of this decision on the merits, to file a supplemental complaint concerning damages.

V. ORDERING CLAUSES

61. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201 and 206-209 of the Communications Act, as amended, that the above-captioned Complaint filed by AT&T IS GRANTED to the extent discussed herein.

62. IT IS FURTHER ORDERED, that NWB's cross-complaint against AT&T is dismissed.

63. IT IS FURTHER ORDERED, that AT&T, in accordance with the Commissions rules, *see* 47 C.F.R. § 1.722, may file a supplemental complaint concerning damages within 60 days after public notice of this decision.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] 47 U.S.C. § 151 (1982).
[2] 47 U.S.C. § 201(b), 202(a) (1982).
[3] 47 U.S.C. §§ 220 (1982).
[4] 47 U.S.C. § 214 (1982).
[5] 47 U.S.C. §§ 203-204 (1982).
[6] 47 U.S.C. § 205(a) (1982).
[7] 47 U.S.C. § 154(i) (1982).
[8] 47 U.S.C. § 501 *et seq.* (1982).
[9] 47 U.S.C. §§ 206, 208-209 (1982).

[10] *Nader v. FCC*, 520 F.2d 182, 203-204 (D.C. Cir 1975). *See United States v. FCC*, 707 F.2d 610 (D.C. Cir. 1983). The D.C. Circuit ruled that such rate of return prescriptions are "necessary for the Commission to carry out its [ratemaking] functions in an expeditious manner." *Nader v. FCC*, 520 F.2d at 204.

[11] On one occasion during this period, AT&T's earnings exceeded the return established by the Commission for determining compliance with our prescription. The Commission's order directing AT&T to refund its overearnings was upheld by the U.S. Court of Appeals for the District of Columbia Circuit. *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987) (*New England Telephone*), *cert. denied*, 109 S. Ct. 1942 (1989).

[12] Although the Commission prescribed a rate of return for the Bell System alone and not for so-called "independent" (*i.e.*, non-Bell) local exchange carriers, the return prescribed for the Bell System operated indirectly as a check on the justness and reasonableness of all local exchange carrier earnings because of the existence of a process known as "settlements and division of revenues." Essentially, this process entailed the pooling of costs and revenues among the Bell System companies and, separately, between them and the independents. The process was referred to as a "partnership" because it helped all the participants achieve a relatively stable and uniform return on their investment. For a more complete discussion of the "partnership" process and its impact on the industry, see *MTS and WATS Market Structure, Second Supplemental Notice of Inquiry and Proposed Rule Making*, 77 FCC 2d 224, 226-231 (1980); *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Federal - State Joint Board, Recommended Decision and Order*, 2 FCC Rcd. 2324, 2337-2340 (1987).

[13] The Commission has prescribed for all local exchange carriers, including the defendants, a methodology known as the "access charge system," which carriers are required to follow in tariffing their interstate services. The system determines, *inter alia*, the carriers' overall rate structure and the allocation of costs within that structure, and was in effect during the period covered by the complaints. The access charge system is codified in Part 69 of the Commission's rules. *See* 47 C.F.R. § 69.1 *et seq.* (1988). These rules were developed in a proceeding that was the subject of numerous challenges on appeal. With few exceptions not relevant to the instant complaint proceedings, these appeals were denied by the D.C. Circuit. *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

During the access charge Rule Making, the Commission terminated the "settlements and division of revenues" agreements because the "partnership," as it was then structured, was incongruent with the rapidly changing industry structure. It was replaced by more limited pooling arrangements, within the access charge framework, in which only local exchange carriers participated. *MTS and WATS Market Structure, Third Report and Order*, CC Docket No. 78-72, 93 FCC 2d 241, 326-330 (1983).

[14] *See Authorized Rates of Return for the Interstate Services of AT & T Communications and Exchange Telephone Carriers*, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41350 (Oct. 10, 1985), (*Phase I Order*), *on reconsideration, Memorandum Opinion and Order*, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 1103 (Apr. 1, 1986) (*Phase I Reconsideration); on further reconsideration*, FCC 86-544 (released Jan. 14, 1987). *See also Procedures and Methodologies to Establish Reporting Requirements*, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[15] *Phase I Order*, 50 Fed. Reg. at 41353.

[16] *See, e.g., Phase I Order*, 51 Fed. Reg. at 41350, para. 1 ("In this phase of the proceeding, we address the maximum allowable rates of return and enforcement procedures for the regulated... interstate access services of local exchange carriers (LECs)"); *Id.*, 51 Fed. Reg. at 41352, para. 22 (Commission affirms decision tentatively adopted at earlier stage of proceeding that it "should not prescribe a minimum return requirement"); *see also New England Telephone*, 826 F.2d at 1108 (noting the Commission's practice not to set minimum guaranteed rates of return); *but cf. AT & T v. FCC*, *infra* n.23, 836 F.2d at 1390 (expressing the belief that the prescription is the minimum possible return; it is both the "minimum and maximum").

[17] *Phase I Order*, 50 Fed. Reg. at 41352-53 (paras.13-21).

[18] *Id.*, 50 Fed. Reg. at 41352 (para. 16). The foremost goal of the Commission's access charge proceeding was to prevent discrimination by establishing a single, uniform and nondiscriminatory tariff structure covering those services that make identical or similar use of local exchange carrier facilities. *See MTS and WATS Market Structure, Third Report and Order*, CC Docket No. 78-72, 93 FCC 2d 241 (1983).

[19] *Phase I Reconsideration*, 51 Fed. Reg. at 1105 (para. 34).

[20] The 12.75 percent rate of return was prescribed by the Commission in 1981 for the unified Bell System. *AT & T Co.* 86 FCC 2d 221, 251 (1981). In reviewing this prescription on appeal, the District of Columbia Circuit held that the Commission had acted reasonably in selecting a return within a zone of reasonableness. *See United States v. FCC*, 707 F.2d 610, 615-619 (1983). Following divestiture, the Commission, pursuant to notice and comment Rule Making procedures, directed AT&T and the BOCs to target their rates to achieve a 12.75 percent return. *See MTS & WATS Market Structure*, 93 FCC 2d 241, 315-316 (1983). In the rate of return proceedings, the Commission determined, based on its review of the record, that the 1981 prescription would continue in force for an interim period (*i.e.*, until the Rule Making was completed and the methodologies and procedures adopted therein were available for prescribing a new rate of return). *Phase I Order*, 50 Fed. Reg. at 41350 (para. 4).

[21] *Phase I Order*, 50 Fed. Reg. at 41352 (para. 21). The initial review period was shortened in order to align it with the "test year" used by the carriers to develop their rates. *Id.* (para. 21 & n.26).

[22] 47 C.F.R. § 65.701(b) (1988).

[23] *AT & T v. FCC*, 836 F.2d 1386, 1390 (D.C. Cir. 1988).

[24] *Id.*, 836 F.2d at 1392.

[25] *See* AT&T v. NWB, ENF No. E-88-21, filed September 30, 1987. AT&T subsequently amended its complaint. *See* AT&T v. NWB, Amended Verified Complaint, ENF No. E-88-21, filed April 22, 1989. All references in this order to AT&T's complaint against NWB are to AT&T's amended complaint.

[26] The interstate access categories are carrier common line, special, and switched traffic sensitive. *See* 47 C.F.R. § 65.702 (1988)

[27] 520 F.2d 182 (D.C. Cir. 1982).

[28] 826 F.2d 1101 (D.C. Cir. 1987) (*New England Telephone*), *cert. denied*, 109 S. Ct. 1942 (1989).

[29] *See AT & T v. Northwestern Bell Tel. Co.*, DA 89-888 (released July 27, 1989).

[30] In making the calculation, defendant was instructed to assume a study area defined by the geographical reach of defendant's filed tariff, a maximum allowable rate of return of 13.1 percent per overall interstate earnings. Calculations were to be explained fully with evidentiary support adequate to allow the Bureau and complainant to evaluate defendant's arguments and support documentation.

[31] NWB Response, at 9.

[32] *Id.*, at 9-16.

[33] *Id.*, at 10-14. NWB argues that AT&T had full opportunity to challenge the rates during the tariff review process and can not properly do so at this time.

[34] *Id.*, at 13-14, *quoting AT & T v. FCC*, 836 F.2d at 1394 (Starr, J., concurring).

[35] NWB Response, at 21.

[36] *Id.*, at 6.

[37] *See* 47 C.F.R. § 0.291(e) (1988).

[38] NWB Response, at 22-24.

[39] *Id.*, at 24-25.

[40] *Id.*, at 24-26.

[41] AT&T Reply, at 5-6.

[42] *Id.*, at 7-9.

[43] *Id.*, at 2-3.

[44] *Id.*, at 3-4.

[45] The Act grants the Commission authority to conduct its proceedings in such manner as is most condusive to the proper dispatch of business and to the ends of justice, and to perform any and all acts, not inconsistent with the Act, as may be necessary in the execution of our functions. 47 U.S.C. §§ 154(i)-(j) (1988). Pursuant to this authority, we limit our consideration of issues raised in AT&T's complaint to those concerning liability. AT&T is free to file a supplemental complaint in pursuit of its damage allegations. This action is consistent with our rules, which provide that damages may be awarded in a supplemental complaint proceeding based on a determination by the Commission relating to the original complaint that it "contains appropriate allegations showing such evidence that will identify, with reasonable certainty, the amount of damages for which recovery is sought." 47 C.F.R. § 1.722 (1988). We conclude that AT&T's complaint contains the appropriate allegations. *See* AT&T v. NWB, ENF No. E-88-21, at 5-6, filed Apr. 22, 1988. We take this action because it will allow us to consider the damage questions raised in AT&T's complaint concurrently with questions of this nature raised in similar complaints filed by MCI Telecommunications Corporation. *See* MCI Telecommunications Corp. v. Pacific Northwest Bell Tel. Co. *et al.*, FCC 89-344; (adopted Dec. 12, 1989).

[46] 47 C.F.R. § 1.720(b) (1988).

[47] As noted *supra*, at para. 10, in the prescription proceedings, the Commission established, *inter alia*, an authorized return for use in developing tariff rates and a "spread" or "buffer" above that return that would be used in proceedings relating to the enforcement of the prescription. During the period in question, LECs were notified that the maximum allowable rate of return for overall interstate earnings would be 13.10 percent, and that the maximum allowable return for any access service category would be 13.25 percent. The defendant relies on the continuing validity of the 13.10 percent overall interstate limitation as a defense to AT&T's complaint. *See*, e.g., NWB Response to Order to Show Cause, at 19-20 (alleging that NWB did not violate prescription because the aggregated, overall interstate earnings of all US West operating companies was less than 13.10 percent).

[48] The monitoring report is entitled "FCC Form 492, Rate of Return Report," and carriers are required to file it with the Commission on a quarterly basis. *See* 47 C.F.R. § 65.600(b) (1988). The Commission developed the report, and the methodology carriers are required to use in calculating the rates of return contained in the report, in a Rule Making proceeding. The proceeding was initiated for the purpose establishing a uniform method of calculating and monitoring carriers' interstate rates of return for use in the enforcement of the Commission's rate of return prescriptions and to assist the Commission in the tariff review process. *See Amendment of Part 65, Procedures and Methodologies to Establish Reporting Requirements, Report and Order*, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[49] NWB Response to Order to Show Cause, at 13-15.

[50] *Id.*, at 15.

[51] *Id.*, at 25-26 (emphasis in original).

[52] NWB Motion to Dismiss, at 9-10 citing *Phase I Order*, at para. 36. NWB also quoted *The Western Union Telegraph Company*, 95 FCC 2d 881, 910 ("We believe that Telex usage element earnings which exceed the prescribed earnings level for Telex service overall by only 1 or 2 percentage points do not render the service element rates unreasonable[.]"). *Id.* NWB also claimed that the holding in AT&T v. FCC implies that rates earning in excess of a rate of return prescription are not unjust or unreasonable. *Id.*

[53] NWB Response, at 15-21. NWB argues that overearnings can be judged only according to the aggregate returns of all US West Operating Companies because "'investors in a carrier, after all, must invest in the carrier as a whole.'" *Id.*, at 19, quoting AT&T v. FCC, 836 F.2d at 1392.

[54] The three US West Operating Companies are NWB, the Mountain States Telephone and Telegraph Company, and the Pacific Northwest Bell Telephone Company.

[55] *Arizona Grocery v. Atchison*, T.&S.F.R. Co., 284 U.S. 370, 384 (1932) (emphasis in original). In this case, the Court was interpreting sections of the Interstate Commerce Act (ICA) establishing private actions for damages. These sections were lifted from the ICA by Congress when it adopted the Communications Act in 1934 and have remained essentially unchanged since that time. *Compare* 49 U.S.C. §§ 6-9 w ith 47 U.S.C. §§ 206-209. For that reason, the Commission often looks to cases decided under the ICA for guidance in deciding complaint cases.

[56] *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975).

[57] *Id.*, 520 F.2d at 204.

[58] Carriers are bound to abide by validly promulgated Commission orders until they are superseded. 47 U.S.C. § 408 (1982). More particularly, carriers must adhere to prescription orders until the Commission approves a different course of conduct. 47 U.S.C. § 205(a) (1982).

[59] *Nader v. FCC*, 520 F.2d at 203-204.

[60] *New England Telephone*, 836 F.2d at 1106, 1107, quoting *Arizona Grocery v. Atchison Ry.*, 284 U.S. 370, 386 (1931).

[61] *New England Telephone*, 826 F.2d at 1106 (emphasis in original).

[62] NWB Response to Order to Show Cause, at 18 n.47.

[63] AT&T v. FCC, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-or-return prescription").

[64] *Id.*, 836 F.2d at 1392.

[65] The complaint provisions of the Act make a carrier liable to its customers for damages that result from the carrier's unlawful actions or ommissions. 47 U.S.C. §§ 206-209 (1982). These sections of the Act do not provide a basis for a carrier to file a complaint against its customers. *See Illinois Bell Telephone Company, et al. v. American Telephone and Telegraph Co.*, 4 FCC Rcd. 5268 (1989). In the instant proceeding, NWB filed a cross-complaint against AT&T to recover underearnings. Although AT&T is a carrier, the pertinent inquiry for determining the applicability of complaint procedures focuses on the

relationship between the complainant and defendant with regard to the action in question. Here, NWB is alleging it has been damaged by providing service as a carrier to one of its customers, AT&T. There is no basis for such a complaint under the Act and, therefore, NWB's cross-complaint is dismissed.

[66] 47 U.S.C. § 209 (1982).

[67] After noting that the plaintiffs in AT&T v. FCC asserted that the refund rule violated the Communications Act, the Constitution, and the Administrative Procedure Act's prohibition of arbitrary and capricious agency action, the court stated: "We find one of these challenges dispositive. We agree that the Commission's refund rule is arbitrary and capricious agency action under the Administrative Procedure Act." AT&T v. FCC, 836 F.2d at 1389 (citations deleted).

[68] *Id.*, at 1391-93.

[69] *See Nader v. FCC*, 520 F.2d at 201.

[70] *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, 1180-81 (D.C. Cir. 1987).

[71] *See, e.g., FPC v. Tennessee Gas Pipeline Co.*, 371 U.S. 145, 153 (1962) ("a rate for one class or zone of customers may be found by the Commssion to be too low, but the company cannot recoup its losses by making retroactive the higher rate subsequently allowed; on the other hand, when another class or zone of customers is found to be subject to excessive rates and a lower rate is ordered, the company must make refunds to them. The company's losses in the first instance do not justify its illegal gain in the latter."); *TRT Communications v. FCC*, 837 F.2d 1535, 1553 (D.C. Cir. 1988) ("[T]hat a carrier is made subject to refunds or reparation claims, accompanied by a liability for interest, is part of the price it pays for the flexibility in a scheme of carrier-initiated rates. The carrier retains the flexibility to effect a rate increase, but it must account for its increased revenues if those rates are later found to be unlawful."); *see also Communications Satellite Corp. v. FCC*, 611 F.2d 883, 892-94 (D.C. Cir. 1977).

[72] *See Nader v. FCC*, 520 F.2d at 201, 202-203; *MCI Communications Corp. v. FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982).

[73] *See Nader v. FCC*, 520 F.2d at 201.

[74] *See* 47 C.F.R. § 69.4 (1988); *Phase I Order* at paras. 1, 4, 17, 21; *Phase I Reconsideration* at para. 41. *See also Procedures and Methodologiesto Establish Reporting Requirements*, 51 Fed. Reg. at 273-274.

[75] NWB Response to Order to Show Cause, at 24-26.

[76] NWB Answer, at 8-9. Section 415 provides, in pertinent part, that "all complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commisson within two years from the time the cause of action accrues, and not after . . . ." 47 U.S.C. § 415(b) (1982). The term "overcharges" is defined in Section 415 to mean "charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g) (1982).

[77] *Bunker Ramo Corp.*, 31 FCC 2d 449, 453 (1971).

[78] *Id.*, 31 FCC 2d at 454.

[79] 47 C.F.R. § 65.600(b) (1987); *see also Amendment of Part 65, Procedures and Methodologies to Establish Reporting Requirements*, CC Docket No. 86-127, Notice of Proposed Rule Making, 51 Fed. Reg. 15020, 15021 at para. 21 (Apr. 22, 1986); *Id.*, Report and Order, 52 Fed. Reg. 273 (Jan. 5, 1987). Carrier reports filed prior to the close of the review period could not be determinative of a carrier's earnings for the period as a whole. The Commission concluded that the quarterly filing on September 30th following the end of the period would provide a carrier sufficient opportunity to make appropriate accounting adjustments and "close its books," so to speak, with regard to the period.

[80] 47 C.F.R. §§ 0.91 and 0.291 (1988).

[81] Contrary to NWB's suggestion, Section 0.291(e) does not require that formal complaints be designated for a hearing. Rather, it simply states that if certain formal complaints are to be designated for hearing, such designation must be made by this Commission.

[82] Pub. L. No. 100-594, 102 Stat. 3021 (1988) (to be codified at 47 U.S.C. § 151(c)(1)). *See* also 100 CONG. REC. S.15289 (daily ed. Oct. 7, 1988) (remarks of Senator Inouye) (order concluding investigation initiated by certain complaints "shall be issued by the Commission").

[83] *See* Pub. L. No. 100-594, 102 Stat. 3021 (1988) (to be codified at 47 U.S.C. § 208(b)(2)).

[84] *See Nader v. FCC*, 520 F.2d at 199-205.

[85] *New England Telephone and Telegraph Co. v. FCC*, 826 F.2d at 1106-09; AT&T v. FCC, 836 F.2d at 1392.

[86] *See, e.g.*, Comark Cable Fund III, 100 FCC 2d 1244, *recon. denied*, 103 FCC 2d 600, *temporarily stayed*, 104 FCC 2d 451 (1985), *remanded for clarification sub nom.* Northwestern Indiana Telephone Co. v. FCC, 824 F.2d 1205 (D.C. Cir. 1987), *clarified on remand*, 3 FCC Rcd 3096 (1988), *pet. for review denied*, 872 F.2d 465 (D.C. Cir. 1989), *pet. for rehearing or rehearing en banc denied* (D.C. Cir. June 27, 1989).

[87] *See Northwestern Indiana Telephone Co. v. FCC*, 824 F.2d 1205 (D.C. Cir. 1987).

[88] *See Hughes Sports Network*, 38 FCC 2d 1052,1054 (1972); *see also Intercambio, Inc.*, 3 FCC Rcd. 7247, 7260 n.49 (1988); *Peoples Telephone Cooperative*, 62 FCC 2d 113, 116 (1976).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-305

In the Matter of

General Telephone Operating Companies Revisions to Tariff F.C.C. No. 1 — Transmittal No. 555

ORDER

Adopted: January 2, 1990; Released: January 3, 1990

By the Deputy Chief, Common Carrier Bureau:

1. On November 29, 1989, the GTE Telephone Operating Companies (GTOC) filed Transmittal No. 555, which corrects DS3 rates for Michigan, Nebraska, Ohio, and Wisconsin that were originally filed under Transmittal No. 540. In addition, GTOC proposes rates for Multiplexing Arrangements from DS3 to DS1 service.

2. On June 28, 1989, this Bureau released an Order initiating an investigation of GTOC's general DS3 tariff.[1] The captioned filing raises the same issues as the transmittals under investigation in Docket 89-305. Therefore, we have determined that Transmittal No. 555 should be subject to the outcome of that investigation. In addition, we grant GTOC special permission to advance the effective date of Transmittal 555.

3. Accordingly, IT IS ORDERED that GTE Operating Companies, Tariff F.C.C. No. 1, Transmittal No. 555, IS INCORPORATED into the Commission's ongoing investigation in CC Docket No. 89-305.

4. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

5. IT IS FURTHER ORDERED that GTE Telephone Operating Companies SHALL FILE a supplement reflecting the suspension of its DS3 rates for one day no later than January 4, 1990. For this purpose Special Permission No. 90-2 is assigned.

6. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, GTE Telephone Operating Companies SHALL KEEP accurate account of all amounts received pursuant to rates which are the subject of the investigation in CC Docket No. 89-305.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTE

[1] *See* GTE Telephone Operating Companies, Revisions to Tariff F.C.C. No. 1, CC Docket No. 89-305, 4 FCC Rcd 5425 (Com.Car.Bur. 1989) (*GTOC Designation Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-493

In the Matter of

Amendment of Section 73.202(b),	RM-6431
Table of Allotments,	RM-6445
FM Broadcast Stations.	
(West Point and Blair, Nebraska)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 28, 1989; Released: January 9, 1990

By the Chief, Allocations Branch:

1. The Commission has before it petitions for reconsideration filed by LDH Communications, Inc. ("LDH") and CVC Capital Corporation ("CVC"), of the *Report and Order*, 4 FCC Rcd 4507 (1989), which granted the request of Kelly Communications, Inc. ("Kelly") to substitute Channel 300C1 for Channel 300A at West Point, Nebraska, and modify its construction permit for Station KWPN-FM to specify the higher powered channel. In addition, the *Report and Order* dismissed the competing petition of LDH to substitute Channel 299A for Channel 292A at Blair, Nebraska, at the request of LDH. Kelley filed an opposition to the petitions for reconsideration to which LDH and CVC replied.

2. On December 26, 1989, LDH and CVC filed pleadings requesting the withdrawal of their petitions for reconsideration, stating that they no longer object to the grant of Kelly's request and the dismissal of LDH's proposal. As requested, we shall dismiss the petitions for reconsideration. Accordingly, IT IS ORDERED, That the petitions for reconsideration filed by LDH Communications, Inc. and CVC Capital Corporation ARE DISMISSED.

3. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

4. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-612

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Key Colony Beach, Florida) RM-7103

NOTICE OF PROPOSED RULE MAKING

Adopted: December 18, 1989; Released: January 11, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Richard L. Silva (petitioner), permittee of Channel 288A at Key Colony Beach, Florida. Petitioner requests the substitution of Channel 288C2 for Channel 288A at Key Colony Beach, and the modification of his construction permit for Station WKKB (BPH-871110NI) to specify operation on the higher class channel.

2. We believe the public interest would be served by proposing the substitution of Channel 288C2 for Channel 288A at Key Colony Beach. Channel 288C2 can be allotted to Key Colony Beach at the petitioner's specified site, with a site restriction of 16.1 kilometers (10.0 miles) west of the community.[1]

3. As requested, we shall also propose to modify petitioner's construction permit for Station WKKB to specify operation on Channel 288C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the channel at Key Colony Beach or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

4. In view of the fact that Key Colony Beach could receive its first wide coverage area FM station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Key Colony Beach, Florida	288A	288C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 5, 1990,** and reply comments on or before **March 20, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

William D. Silva
Blair, Joyce & Silva
1825 K Street, N.W., Suite 510
Washington, D. C. 20006
(Attorney for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 24-42-28 and West Longitude 81-06-13.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-75

In the Matter of

Amendment of Section 73.202(b),	RM-6556
Table of Allotments,	RM-6629
FM Broadcast Stations.	
(Casa Grande, Claypool	
and Kearny, Arizona)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 21, 1989; Released: January 11, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 2683 (1989), seeking comments on two separately filed petitions for rule making. The first petition, filed by Video Communications and Radio, Inc. (VCRI),[1] proposed substitution of Channel 288C2 for Channel 288A, and modification of its license for Station KFAS(FM) to specify the higher powered channel.[2] In order to accommodate the proposal petitioner requested the deletion of Channel 288A at Claypool, Arizona. [3] Additionally, VCRI noted that its proposal was contingent upon the issuance of a license to Station KTIM-FM, Wickenburg, Arizona, on Channel 287C2.[4] The second petition, filed by Desert West Air Ranchers Corporation ("Desert"), permittee of Station KCDX(FM), Channel 286A, Kearny, Arizona, proposed substitution of Channel 287C2 for Channel 286A and modification of its permit accordingly. Desert also requested the substitution of Channel 291A for Channel 288A at Claypool, Arizona, to accommodate its proposal. In response to the *Notice*, VCRI filed supporting letter comments restating its interest in the proposal. Desert filed comments in support of its proposal. Claypool Broadcasting Company ("CBC") filed comments in support of substituting Channel 291A for Channel 288A at Claypool, Arizona. Phyllis Ehlinger ("Ehlinger") filed comments and counterproposal to allot Channel 287A to Marana, Arizona. VCRI, Desert, Claypool, and Ehlinger filed reply comments.

2. The *Notice* consolidated Desert West's and VCRI's proposals based on a short-spacing between each parties requested upgrades. However, the *Notice* indicated that Desert West had apparently chosen a site for the Kearny allotment as far away as possible from the Casa Grande upgrade site, and that if the Casa Grande proposal were restricted to a site further from Casa Grande than the site proposed by VCRI, both proposals could be granted. The *Notice* requested comments as to whether the site restriction was an acceptable solution, and indicated that if it was not, the Casa Grande and Kearny poposals would be comparatively considered. In addition, with respect to the requested deletion of Channel 288A at Claypool, Arizona, the Commission noted that VCRI's request was premised on a forfeiture of the construction permit issued to Station KTTD(FM) for the channel at Claypool. However, two applications for the vacant allotment were subsequently received. CBC is one of two applicants.[5] In view of those expressions of interest, the request for deletion of Channel 288A was not considered. Therefore, as suggested by Desert West, the Commission proposed substituting Channel 291A for Channel 288A.

3. In it's comments, VCRI restates its support of an upgrade of Channel 288A to Channel 288C2, and modification of its license to specify operation on the higher power channel. VCRI states that it has no objections to the proposal set forth in the *Notice* to upgrade Channel 288A to Channel 288C2 at Casa Grande, Arizona, with a site restriction. In it's comments, Desert reaffirms its intention to apply for and promptly construct KCDX as a Class C2 facility by substituting Channel 287C2 for Channel 286A. Desert stated that it had located a potential transmitter site which it believes would be more easily accessible than the site it originally proposed.

4. In response to the *Notice*, CBC filed comments stating that it has no objection to the substitution of Channel 291A for Channel 288A at Claypool, Arizona, so long as it does not lose its cut-off status. CBC presumes that petitioners intend to reimburse it for the costs associated with the substitution.

5. After review of the counterproposal filed by Ehlinger we find that it is unacceptable for consideration.[6] The coordinates specified by Ehlinger do not meet the Commission's minimum distance separation requirements. The proposal is short-spaced to both of the existing licensed stations in this proceeding. Counterproposals must be fully spaced to existing assignments and substantially complete when filed. *See* 47 CFR § 73.208(a); *Broken Arrow, Oklahoma*, 53 FR 46086 (1988).

6. Desert West, in its reply comments, stated that neither it nor VCRI are obligated to reimburse CBC or any other Claypool applicants for the cost of amending their applications to substitute Channel 291A for Channel 288A. Desert West stated that the channel substitution at Claypool will not require any change in the proposed transmitter site, and therefore will not require CBC to incur any material cost.

7. VCRI, in its reply comments, stated it has no objections to a site restriction and that its major concern is to upgrade Channel 288A to Channel 288C2 at Casa Grande, Arizona.

DISCUSSION

8. We must first address the issues raised concerning city grade coverage at Kearny, and a site restriction at Casa Grande. According to a staff engineering analysis, the site Desert proposed at Kearny in comments is slightly closer to the city and in the same direction as that in the *Notice*. Therefore city grade service will be provided to Kearny. The site proposed for Casa Grande in Desert's comments is further from Casa Grande than that in the *Notice* (23.7 kilometers as opposed to 17.7 kilometers). However, the city grade service would still be provided to Casa Grande. Since there are no objections by the Casa Grande licensee of Desert's proposal, we will institute the proposal set forth in Desert's comments instead of the original proposal set forth in the *Notice*.

9. Next we must respond to the reimbursement issue concerning applicants at Claypool. There is no Commission policy of reimbursement with respect to mere applicants for a channel assignment, only to licensees and permittees. Therefore, neither Desert or VCRI are responsbile for reimbursing CBC or any other Claypool applicant.

10. A staff engineering analysis indicates that Channel 288C2 can be allotted to Casa Grande in compliance with the Commission's minimum distance separation requirements with a site restriction of 23.7 kilometers (14.7 miles) northwest of Casa Grande.[7] Channel 287C2 can be allotted to Kearny, Arizona, in compliance with the Commission's minimum distance separation requirements with a site restriction[8] of 41.1 kilometers southeast of Kearny. A staff engineering analysis indicates that Channel 291A can be allotted to Claypool, Arizona in compliance with the Commission's minimum distance separation requirements.[9] Additionally, since Casa Grande, Claypool and Kearny are each located within 320 kilometers (199 miles) of the Mexican border, the Commission has obtained concurrence by the Mexican Government in these proposals.

11. The applicants at Claypool will be permitted to amend their applications to specify the new channel. This may be accomplished without loss of "cut-off" status since no upgrade in class of channel will result. *See, Salamanca, NY and Bradford, PA, 50 FR 26208 (1985); and Sanibel, FL, 50 FR 32706 (1985).* Since the modification requests at Casa Grande and Kearny propose to upgrade in conformity with the provisions of Section 1.420 of the Commission's Rules, we shall modify those facilities, as requested.

12. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules. IT IS ORDERED, That effective **February 26, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Casa Grande, Arizona	288C2
Kearny, Arizona	287C2
Claypool, Arizona	291A

13. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KFAS-FM, IS MODIFIED, to specify operation on Channel 288C2 in lieu of Channel 288A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KCDX(FM) IS MODIFIED, to specify operation on Channel 287C2 in lieu of Channel 286A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

15. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicants for Channel 288A at Claypool, AZ, as follows: James Mace, tr/as Gila County Broadcasting Co., 1240 S. Saguaro Dr., Globe, AZ 85501 and Claypool Broadcasting Company, Rt. 1, Box 25, Globe, AZ 85501.

16. IT IS FURTHER ORDERED, That the counterproposal filed by Phyllis Ehlinger requesting the allotment of Channel 287A to Marana, Arizona, IS DISMISSED.

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact Ordee D. Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Formerly known as VideoTrips Corporation ("VTC"). In September of 1988, the company changed its name from VideoTrips Corporation to Video Communications and Radio, Inc.

[2] The assignment of the license of Station KBBT-FM from KVOS, Inc. to KPIN, Inc. was consummated in March of 1989. KPIN changed its call sign from KBBT-FM to KFAS-FM.

[3] In the *Notice*, with respect to the requested deletion of Channel 288A at Claypool, Arizona, the Commission noted that VTC's request was premised on a forfeiture of the construction permit issued to Station KTTD(FM). However, two applications for the vacant allotment were subsequently received. *See* File Nos. 880613MH (request for dismissal pending) and 880711MQ. Therefore, in view of those expressions of interest, the request for deletion of Channel 288A at Claypool will not be considered.

[4] During this proceeding, the call letters of KCIW-FM changed to KTIM-FM. The construction permit has been granted, however, even with the modification of Casa Grande to 288C2, Casa Grande must still await the issuance of a license to cover the construction permit, issued to Station KTIM-FM, Channel 287C2 at Wickenburg, Arizona.

[5] *See* File No. 880711MQ. A request for dismissal is pending in the case of James Mace, tr/as Gila County Broadcasting Co., the other applicant. *See* File No. 880613MH.

[6] Since Ehlinger's counterproposal is unacceptable, it was not placed on public notice.

[7] Reference coordinates at the restricted site for Channel 288C2 at Casa Grande are 33-00-00 and 111-57-30.

[8] Reference coordinates at the restricted site are 32-48-59 and 110-33-30.

[9] Reference coordinates at the application sites for Channel 288A at Claypool are 33-22-51 and 110-45-25 (880613MH) and 33-24-23 and 110-48-18 (880711MQ).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 10, 1990

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AMERITECH'S PLAN TO PROVIDE COMPARABLY EFFICIENT INTERCONNECTION TO PROVIDERS OF ENHANCED PROTOCOL PROCESSING SERVICES

On November 6, 1989, the Ameritech Operating Companies (Ameritech) filed a plan to provide comparably efficient interconnection (CEI) to providers of enhanced protocol processing services. Ameritech proposes to offer on an unseparated basis a variety of enhanced protocol processing services in connection with three different classes of underlying basic services: (1) Exchange Telephone Services; (2) Private Line Services; and (3) the Ameritech Packet Switched Network (APSN). Ameritech also proposes to engage in joint marketing of enhanced protocol processing services in connection with its underlying basic services. Ameritech notes that in the future, it may expand its offering of protocols as new protocols become available.

As required in the *Computer III proceeding (Phase I Order,* 104 FCC 2d 958 (1986), *modified on reconsideration,* 2 FCC Rcd 3035 (1987), *further reconsideration,* 3 FCC Rcd 1135 (1988)), the Commission must approve this CEI plan before Ameritech can begin implementing the proposed service. Ameritech states that the services it proposes to offer are substantially the same as those services offered by Bell Atlantic in its CEI plan for protocol processing, which the Commission has approved (4 FCC Rcd 2744 (1989)).

Ameritech describes how it will satisfy the Commission's CEI parameters, Ameritech states that if the plan is approved, it will make the necessary updates to its Cost Allocation Manual to comply with the cost allocation rules. Ameritech also describes its plans for complying with the other *Computer III* nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting, and disclosure of network information.

Interested parties should file comments on this plan by **February 1, 1990,** and reply comments by **February 15, 1990,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Ameritech's plan can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHWESTERN BELL TELEPHONE COMPANY — File No. AAD 6-1473

Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide and Market Asynchronous Protocol Conversion on an Unseparated Basis

MEMORANDUM OPINION AND ORDER

Adopted: January 2, 1990; Released: January 10, 1990

By the Commission:

I. INTRODUCTION

1. By a *Memorandum Opinion and Order*, 2 FCC Rcd 20 (1987), (hereinafter the *Waiver Order)*, the Chief, Common Carrier Bureau, accepted the protocol conversion plan filed by Southwestern Bell Telephone Company (Southwestern). The *Waiver Order* permits Southwestern to provide asynchronous to X.25 and asynchronous to X.75 protocol conversion services jointly with its basic packet-switched data transmission service (which Southwestern calls MICROLINK II service). The *Waiver Order* also permits Southwestern to collocate equipment to provide protocol conversion and basic services and to market, bill and collect, and install and maintain these services without adhering to the structural separation requirements of the *Computer II* rules.[1] On February 5, 1987, Telenet Communications Corporation (Telenet) filed an Application for Review of the *Waiver Order*. For the reasons set forth below, we deny or dismiss all aspects of Telenet's application for review.

II. BACKGROUND

2. The *Computer II* rules required the American Telephone and Telegraph Company (AT&T) and (upon the divestiture of the Bell System) the Bell Operating Companies (BOCs) to offer "enhanced services" on an unregulated basis through subsidiaries separated from their regulated operations. "Enhanced services" include protocol conversion offerings.[2] Subsequently, in our *Protocols Decision*, [3] we established criteria which would, if met, support waiver of the requirement that protocol conversion offerings be made through separate subsidiaries. Soon thereafter, at the request of the BOCs, we ruled that conversions between the X.25 format and the X.75 format (used in interconnecting networks) could be treated as a basic service.[4] Several BOCs then asked that we waive the *Computer II* separation requirements to permit them to provide conversion from asynchronous protocols to X.25 packet-switched network protocols in conjunction with basic packet switching services, using facilities located in their central offices. Asynchronous to X.25 conversion permits a large number of terminals and other equipment using asynchronous transmissions, including most personal computers, to have access to packet-switched networks. In the *Protocol Waiver Order* [5] we determined that the public interest would be served by permitting the BOCs to offer asynchronous to X.25 protocol conversions using equipment in their central offices. However, to protect against anticompetitive behavior, we conditioned the collocation waiver on the BOCs' meeting certain specified requirements. We also established criteria for waiver of the *Computer II* Rules if a BOC also wished to market protocol conversion services.[6]

3. On July 3, 1986, Southwestern filed a plan with the Common Carrier Bureau and asked that it be found in compliance with the collocation waiver conditions. Southwestern also sought a waiver to permit it to perform joint marketing, billing, and installation. Telenet and two other parties opposed various aspects of Southwestern's filing. Telenet raised four arguments for rejecting Southwestern's filing which are relevant to the application now before us. First, it objected to the failure of Southwestern to file any federal tariff for its MICROLINK II packet-switched service. Telenet asserted that the incorporation of state tariffs by reference should not be permitted. Telenet also claimed that the state tariffs which Southwestern was incorporating by reference offer support for protocols beyond those authorized by the *Protocol Waiver Order* and that they were therefore unlawful. Telenet further claimed that Southwestern's accounting plan was fundamentally flawed because it was based on an incremental rather than a fully distributed costing methodology for identifying the nonregulated investments and costs associated with Southwestern's packet-switched services. Telenet claimed this Commission's rules require the use of a method based on fully distributed costs. Finally, Telenet claimed that Southwestern's filing should be rejected because Southwestern proposed a Network Utilization Rate Element (NURE) of zero.[7]

4. In its reply, Southwestern stated that this Commission clearly had the authority to waive its rules and permit a carrier to cross reference its state tariffs, provided that the carrier met all applicable waiver requirements. Southwestern noted that the Bureau had granted similar waivers to other BOCs and that the waiver was justified in this instance. Southwestern claimed that the waiver would benefit customers and at the same time stimulate competition. Southwestern stated that the references in its compliance filing to protocols other than asynchronous, X.25, and X.75 had nothing to do with its proposed protocol conversion services. The only "net" protocol conversions Southwestern intended to offer were X.25 to X.75 and asynchronous to X.25 and X.75, and these conversion were covered by the *X. 25 / X. 75 Waiver Order* and the *Protocol Waiver Order*. Southwestern also asserted that this Commission was not required to apply fully distributed costing principles to ensure that Southwestern does not cross subsidize its protocol conversion service with revenues derived from its regulated monopoly services. The state commissions, which approved the use of incremental costing for Southwestern's packet-switched tariffs, also have, Southwestern asserted, a high level of interest in preventing cross subsidization. Southwestern also stated that in any event the use of

costing methods other than fully distributed costing may be permitted upon a proper showing of competitive necessity. Southwestern stated that the packet-switched services market is highly competitive, and in consequence deviation from fully distributed costing was necessary for Southwestern to compete in that market. Finally, Southwestern stated that a zero-level NURE was justified in its case because the type of equipment it would use suffers from no inefficiencies as a result of the protocol conversion function.

5. In the *Waiver Order*, the Bureau found that Southwestern had demonstrated compliance with the requirements specified in the *Protocol Waiver Order* and accepted Southwestern's compliance plan, permitting it to collocate protocol conversion equipment in its central offices. The Bureau also granted Southwestern a waiver permitting joint marketing and billing. The Bureau rejected the contentions that Southwestern's plan should not be accepted because Southwestern failed to file a federal tariff and associated support material. The Bureau stated that Southwestern had received a waiver of Section 61.74 of this Commission's rules permitting it to reference its state tariffs in its federal filing. The Bureau found that this waiver "in essence" relieved Southwestern from filing the cost support data accompanying the tariff filing.[8] The Bureau also found the costing methodology for Southwestern's packet-switched service in its state tariffs to be acceptable. The Bureau stated that while this Commission normally requires carriers to justify their rates based on a fully distributed costing methodology, we have in certain instances permitted an incremental costing approach when a proper showing of competitive necessity had been made.[9] The Bureau found that the NURE to be applied to Southwestern's packet-switched service should be zero. It stated that a study submitted by Southwestern as part of its filing adequately demonstrated that there would be no operational inefficiencies occurring in the Southwestern system as a result of the performance of the protocol conversion function.[10] Finally, the Bureau discussed, but did not specifically reject, Telenet's claims that Southwestern's state tariffs provided for use of protocols beyond those authorized by our various orders.[11]

III. THE PLEADINGS

A. Telenet's Application for Review

6. Telenet seeks review of the *Waiver Order* insofar as it: (1) permits Southwestern to incorporate its state tariffs for its MICROLINK II service by reference in its federal tariffs; (2) permits Southwestern to assign costs to its packet-switched service on the basis of incremental rather than fully distributed costs; (3) fails to address Telenet's contention that Southwestern is offering protocol conversions in addition to the asynchronous to X.25 conversion to which it is specifically limited in the *Protocol Waiver Order;* and (4) approves the use of a zero NURE.[12] Telenet asks that we require Southwestern to file a complete federal tariff, supported on the basis of fully distributed costing, containing a reasonable NURE, and purged of any offering of protocol conversions other than asynchronous to X.25.

7. Telenet claims that by permitting Southwestern to incorporate its state tariffs by reference in its federal tariff, the Bureau has abdicated to the states its tariff oversight functions. Telenet notes that the Bureau rejected its claims in part by stating that the Bureau had authorized other carriers to cross-reference a state tariff. Telenet asserts that the Bureau specifically relied on a waiver granted to BellSouth, and states that it filed an application for review of that action raising precisely the same issue involved in its instant application. Telenet states that rather than restate the arguments it has already made with regard to this issue, it is incorporating its previous filings by reference. Telenet adds, however, that the Bureau's conclusion (at para. 54 of the *Waiver Order)* that the waiver permitting the cross referencing of state tariffs in essence relieves the carrier from filing the accompanying support data is a "patent *non sequitur* " and lies at the heart of Telenet's concern. Telenet states that by refusing to assume any oversight with respect to the BOCs' packet-switched services the Bureau has effectively deprived the Commission of any ability to ensure that the pro-competitive conditions of the *Protocol Waiver Order* are being fulfilled on an ongoing basis. It asserts that the state commissions, to whom the Bureau is abdicating this Commission's authority, lack either familiarity with the subject matter or the resources necessary to ensure that packet-switched services are being offered fairly and not anti-competitively.[13]

8. Telenet also asserts that the Bureau ignored Telenet's contention that Southwestern is offering protocol conversions for which it has neither sought nor received a waiver. Telenet states that Southwestern's state tariffs offer support for devices using bisynchronous and Synchronous Data Link Control (SDLC) protocols as well as for those using asynchronous and X.25 protocols. Telenet also states that Southwestern's market forecast indicates that 45% of its synchronous traffic would come from bisynchronous protocol support, while X.25 protocol support would account for only 10%. Telenet notes that it argued to the Bureau that the *Protocol Waiver Order* extended only to asynchronous to X.25 conversions, and that in the *Supplemental Notice of Proposed Rule Making* in the *Computer III* inquiry[14] the Commission laid out additional requirements for BOCs wishing to offer additional protocol conversions, requirements which Telenet claims Southwestern has not met. Telenet states that the Bureau merely recited Southwestern's answer that its compliance filing did not encompass any conversions beyond asynchronous and that therefore Telenet's argument was without merit. Telenet states the Bureau thus never resolved the issue. Telenet asserts that Southwestern's offering is contained in its tariffs, not in its compliance filing, and it is unquestionable that those tariffs include support for protocols not embraced by the *Protocol Waiver Order.* Southwestern's marketing plans are also predicated upon traffic using these other protocols. Telenet states that the Bureau's failure to grasp this issue further evidences its unwillingness to enforce the *Protocol Waiver Order.*

9. Telenet next states that the Bureau's approval of incremental, rather than fully distributed, costs as a basis for Southwestern's rates in its MICROLINK II tariffs is at odds with this Commission's cost allocation policies for nonregulated services as established in the *Joint Cost* proceeding.[15] Telenet claims that the Bureau's action cannot be reconciled with the "competitive necessity" test upon which it relied. Telenet states that Southwestern made no showing of "competitive necessity"; rather, it merely argued that the packet switching/asynchronous protocol conversion market is highly competitive and that therefore "direct" costing is a necessity for Southwestern to

compete in that market. Telenet states that Southwestern submitted no economic data to support its conclusory claim and offered no comparison of its rates and those of competitors.

10. Telenet continues that the two Commission decisions relied upon by the Bureau in permitting the use of incremental costs are not applicable to Southwestern's situation.[16] Telenet states that the *Docket No. 83 - 1145 Order* (rejecting AT&T's divestiture related private line tariffs) did not discuss fully distributed as opposed to incremental costing, much less "competitive necessity." Telenet states that the *Guidelines Order*, by its terms, specifically did not apply to the BOCs (except for two exceptional situations), and that, while permitting departure from fully-distributed costing, it also rejected incremental or marginal costing. Instead, Telenet asserts, the *Guidelines Order* adopted a "net revenue" test, which Southwestern has made no effort to meet. Further, Telenet contends, the Bureau did not impose upon Southwestern in the *Waiver Order* the ratepayer-protective conditions set out in the *Guidelines Order*. Telenet claims, therefore, that the *Guidelines Order* has no precedential value with regard to Southwestern's compliance filing.

11. Finally, Telenet claims that the Bureau improperly approved Southwestern's use of a zero-level NURE. It states that the equipment to be used by Southwestern has characteristics identical in all significant aspects to those which this Commission considered when we established the NURE requirement. It states that neither the Bureau nor Southwestern acknowledged, much less attempted to deal with, the underlying factual circumstances. Telenet concludes that the Bureau has effectively reversed the *Protocol Waiver Order* and the NURE requirement on a demonstrably erroneous factual basis.

B. Southwestern's Opposition

12. Southwestern states that the *Waiver Order* is appropriate in all respects, and that this Commission should uphold that order as written. Southwestern asserts that the Bureau has the authority to permit a carrier to incorporate its state tariffs by reference in its federal tariffs, and that there is good cause to permit such cross referencing in this case. It rejects Telenet's claim that, by permitting cross referencing, the Bureau is refusing to assume any tariff oversight with respect to the BOCs' packet-switched services. Southwestern states that the Bureau has exhibited significant oversight responsibility regarding Southwestern's packet-switched services -- requiring Southwestern to provide copies of proposed federal and state tariffs and associated cost materials so as to ensure that the unregulated asynchronous protocol conversion offering was not cross-subsidized by the regulated basic packet offering. Southwestern states that after reviewing those materials, the Bureau accurately concluded that no anticompetitive cross-subsidies were involved in Southwestern's MICROLINK II tariff. Southwestern states that it will furnish the Bureau with copies of future changes in its MICROLINK II tariffs and associated cost materials on request. It states that the Bureau will therefore be able to engage in the same competitive analysis in the future as well.

13. Southwestern asserts that the *Waiver Order* does not permit Southwestern to offer unauthorized protocol conversions. Southwestern states that while its MICROLINK II equipment can pass or carry traffic involving several protocols, it is offering a protocol conversion service for "net" protocol conversions only as described and permitted in the protocol waiver order. It claims that an enhanced service is performed only when data leave the network in a different protocol than the one in which they entered the network. Southwestern explains that the data can be transmitted through the network as part of a basic service in any protocol so long as the entry and exit protocols are the same. Southwestern states that the Bureau appropriately accepted Southwestern's explanation of references to protocols other than asynchronous within its compliance filing, and Telenet has presented no evidence to the contrary.

14. Southwestern argues that the Bureau properly permitted Southwestern's compliance plan to use an incremental costing methodology in the assignment of costs to its packet-switched services. It asserts that there is sufficient precedent for approving the use of incremental costs in competitive markets. Southwestern states that a high percentage of its packet-switched traffic will be intrastate, and the various state commissions approved the use of incremental costs for this service. Southwestern claims that even to the extent that traffic will be interstate, Telenet's complaint is unjustified, since Telenet incorrectly asserts that Southwestern has failed to make the requisite showing of "competitive necessity." It states that the record of this proceeding is replete with references to the intensely competitive nature of the packet-switched business in general. It states that it is entering this business with a zero market share, while some of its competitors are well established in the packet-switched services market. It states that in our *Notice of Proposed Rule Making* in CC Docket 86-421, this Commission tentatively concluded that packet services appear to be leading candidates for decreased tariff regulation since it appears that a strong competitive market exists obviating the need for an active regulatory presence.[17]

15. Southwestern also states that Telenet is incorrect in stating that the *Joint Cost Order* requires reversal of the *Waiver Order*. Southwestern asserts that the *Joint Cost Order* only sets out specific time frames in the future within which BOCs must file new asynchronous protocol conversion cost allocation plans; it does not require reversal of existing Bureau orders. Finally, Southwestern claims that Telenet incorrectly states that the *Docket No. 83 - 1145 Order*, cited by Southwestern and the Bureau, does not discuss fully-distributed versus incremental costing. Rather, Southwestern asserts, that Order states (at page 9 of the Appendix) that incremental costs could be a permissible basis for rates upon a proper showing of competitive necessity.

16. Southwestern finally asserts that Telenet is incorrect in claiming that approval of a zero NURE for Southwestern violates the *Protocol Waiver Order*. Southwestern states that Telenet's arguments in this regard refer to equipment for which a NURE has been found to be applicable, but that Southwestern will use equipment from a different manufacturer. Southwestern states that the relevant question is whether its packet switching equipment should be subject to a NURE under the *Protocol Waiver Order*, and that its position regarding a zero NURE was supported by its equipment vendor and an independent expert.

IV. DISCUSSION

A. The Referencing of State Tariffs.

17. Most of the BOCs that submitted protocol conversion compliance plans to this Commission sought and were granted a waiver of Section 61.74 of our rules allowing them to incorporate by reference in their federal tariff the rates for packet-switched services contained in their state tariffs. As Telenet notes in its application,[18] it raised precisely the same issue as that now before us in an application for review of the Bureau's order approving the compliance filing of the BellSouth Corporation.[19] In the *BellSouth Order*,[20] we affirmed our jurisdiction over the rates charged by carriers for interstate packet-switched services and concluded that the carrier's rates for its interstate protocol conversion offerings should be included in its federal tariff. Under BellSouth's proposal, customers considering ordering interstate packet-switched service could not determine by examining the BellSouth tariff on file with this Commission what the applicable rates would be. BellSouth had presented no reason for requiring customers seeking an interstate service to consult a state tariff in order to determine what the rates of the interstate service would be. We found that, under the circumstances presented by the BellSouth filing, a waiver of Section 61.74 of the Rules was not justified, and we directed BellSouth to file in its interstate tariff its currently effective rates for its packet-switched service.

18. As a result of the resolution of the identical tariff cross-referencing issue in the *BellSouth Order*, we need not rule on Telenet's argument thereon. On December 28, 1988 the Bureau rescinded its waiver of Section 61.74 of the Rules, and required Southwestern to file a federal tariff containing the terms, conditions and rates for the interstate packet switched service.[21] The portion of Telenet's application that seeks review of the Bureau's grant of a waiver permitting the cross-referencing of state tariffs accordingly is dismissed as moot.

19. We also conclude that Telenet's objection to the Bureau's waiver of the cost support filing requirements set forth in Section 61.38 of the Rules is unfounded.[22] In the *BellSouth Order*, we rejected Telenet's assertion that the Bureau should have required BellSouth to file the detailed cost and demand projections for packet switched service at this time. We noted that Part 61 of the Rules is intended to assist the Bureau in reviewing tariff filings and does not confer procedural rights on private parties. We concluded that it was not necessary to obtain such detailed data for tariff review purposes in that proceeding, because existing market conditions made it unlikely that BellSouth could engage in anti-competitive or otherwise improper pricing.[23] The factors we relied on therein are equally applicable to the instant proceeding. The detailed projections required by Section 61.38 would be of little value in our review of Southwestern Bell's packet switched service at this time and, contrary to Telenet's assertion, would not aid us in ensuring that the pro-competitive policies of the *Protocol Waiver Order* are advanced. Southwestern entered the market with a zero share of the business and strong established competitors. Moreover, the presence of a federal tariff and our willingness to entertain a complaint should problems arise adequately demonstrate that we have not abandoned our authority to the states. We are able, and will not hesitate, to obtain whatever cost support data are necessary to monitor effectively Southwestern's federal rates. Accordingly, we deny Telenet's objection to the Bureau's waiver of Section 61.38.

B. The Offering of Non-authorized Protocols

20. Telenet alleges that Southwestern's state tariffs indicate that Southwestern will offer conversions involving bisynchronous and SDLC protocols in addition to asynchronous to X.25 conversions. Telenet is correct in its assertion that the *Protocol Waiver Order* grants a waiver of the *Computer II* structural separation rules only with regard to the provision of asynchronous to X.25 protocol conversion services. BOCs must obtain approval if they wish to provide other protocol conversion services.[24] Southwestern contends, however, that while its equipment is capable of transmitting other protocols, it is not offering to customers any protocol conversion service other than asynchronous to X.25. It states that the only "net" conversion (where a customer's data will leave the Southwestern system in a protocol different than the one in which it enters) will be between the asynchronous and X.25 (and X.75) protocols.

21. We will accept Southwestern's assurances that it did not intend to and will not offer any unauthorized protocol conversion services without first obtaining the requisite additional authorization. The tariff material cited by Telenet as showing support for unauthorized protocols[25] shows only that terminations are available with bisynchronous and SDLC protocols, not that Southwestern is offering a conversion service into or out of these protocols. This Commission's decisions regarding the BOCs' provision of protocol conversion services do not prohibit the transmission of communications in those protocols, so long as there is no net conversion (or Commission approval thereof). Telenet does not demonstrate how it or any other party would be harmed by Southwestern's transmission of other protocols, so long as the net conversion is within our authorizations. Moreover, we note that Southwestern subsequently requested and received Bureau permission to offer additional protocol conversion services that will facilitate data communications using a variety of synchronous protocols.[26]

C. The Use of Incremental Costing Principles

22. Telenet's concern that the Bureau's allowance of incremental cost allocation in the *Waiver Order* is not consistent with our *Joint Cost Order* is valid. However, we need not rule on Telenet's arguments in this regard. The *Waiver Order* specifically stated that Southwestern's cost allocation plan was only interim, pending the final outcome of the Joint Cost proceeding. The *Joint Cost Order* released shortly thereafter established fully allocated cost principles for separating costs between regulated and nonregulated activities.[27] Moreover, we provided in the *Joint Cost Order* that the BOCs' existing accounting plans filed in connection with the joint marketing of protocol conversion must be replaced.[28] Southwestern has filed and received approval of its manual for allocating costs between regulated and nonregulated activities,[29] and the provisions of that manual now govern the manner in which it accounts for all nonregulated services. Accordingly, Telenet's application in this regard is dismissed as moot.

D. The Use of a Zero Level NURE

23. We do not find it necessary to resolve the factual dispute which underlies Telenet's request that we review the Bureau's approval of Southwestern's use of a zero-level NURE. Since the pleadings in this proceeding were filed, we have readdressed in our *Computer III Phase II Order* the desirability of imposing the NURE requirement on the BOCs. In that Order, we concluded that the requirement that BOCs include a NURE in their packet-switched service tariffs should no longer be imposed, and we therefore eliminated the requirement.[30] Thus, Southwestern is no longer required to include a NURE in its tariff, and this issue is dismissed as moot.

V. ORDERING CLAUSE

24. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 C.F.R. §154(i), That the Application for Review filed by Telenet Communications Corporation IS DENIED to the extent indicated above and IS DISMISSED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 64.702 of the Commission's Rules and Regulations, 47 C.F.R. §64.702. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (*Second Computer Inquiry*), 77 FCC 2d 384 (1980) (*Final Decision*), *reconsideration*, 88 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Ass'n v. FCC, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[2] Section 64.702(a) of the Commission's Rules, 47 C.F.R. §64.702(a). As part of our *Third Computer Inquiry*, we have recently modified our regulatory scheme applicable to enhanced services, including protocol conversion services, by substituting nonstructural safeguards for the structural safeguards adopted in the *Second Computer Inquiry*. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 FCC 2d 958 (1986) (*Computer III Phase I Order*), *modified on recon.*, 2 FCC Rcd 3035 (1987), *further recon.*, 3 FCC Rcd 1135 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989); *appeals pending sub nom.* California v. FCC, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1988) and *sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), *modified on recon.*, 3 FCC Rcd 1150 (1988), *further recon.*, 4 FCC Rcd 5927 (1989), *appeal pending sub nom.* California v. FCC, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988). In the *Computer III Phase I Order*, we applied the conditions of our *Protocol Waiver Order* (*infra* note 5) to BOC packet-switched services which feature asynchronous to X.25 protocol conversion capabilities as a means of providing "comparably efficient interconnection" (CEI) under our modified regulatory scheme. 2 FCC Rcd at 3080-81.

[3] Communications Protocols under Section 64.702 of the Commission's Rules and Regulation, *Memorandum Opinion and Order and Statement of Principles*, 95 FCC 2d 584 (1983).

[4] Petitions for Waiver (X.25/X.75), *Memorandum Opinion and Order*, FCC 84-561 (released November 28, 1984) (*X. 25 / X. 75 Waiver Order)*

[5] Petitions for Waiver of Sections 64.702 of the Commissions Rules (Computer II), 100 FCC 2d 1057 (1985) (*Protocol Waiver Order).*

[6] *Id.* at 1104.

[7] The second condition specified in the *Protocol Waiver Order* which must be met before a carrier is entitled to utilize the collocation waiver requires that the carrier tariff as part of its X.25 to X.75 transmission service a separate "network utilization rate element" to be applied to the use of any port operating on an asynchronous protocol. The purpose of this charge was to compensate for any loss of efficiency that occurs in the packet-switched network when asynchronous to X.25 protocol conversion is being performed. *See Protocol Waiver Order*, 100 FCC 2d at 1096-97, 1107-09.

[8] *Waiver Order*, 2 FCC Rcd at 26.

[9] *Id.* at 25.

[10] *Id.*

[11] *Id.* at 24.

[12] Telenet raises the NURE argument in a lengthy footnote attached to its argument concerning unauthorized protocols, citing the Bureau's treatment of the NURE requirement in regard to Southwestern's filing as "further evidence" of the Bureau's apparent disinterest in enforcing the Commission's Protocol *Waiver Order*. Telenet Application at 8. In its initial listing of the grounds upon which review is being sought, Telenet listed only the first three grounds given above. *Id.* at 1. However, in its conclusion, Telenet asks that we require Southwestern to file a tariff containing a "reasonable" NURE. *Id.* at 9. We will therefore treat this claim as a separate matter on which review is being sought.

[13] Telenet Application at 6-7.

[14] Amendment of Section 64.702 of the Commission's Rules and Regulations *(Third Computer Inquiry)*, FCC 86-253 (released June 16, 1986) *(Supplemental Notice)*.

[15] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities 2 FCC Rcd 1298 (1987) *(Joint Cost Order), modified on recon.*, 2 FCC Rcd 6283 (1987); *further recon.*, 3 FCC Rcd 6701 (1988); *petition for review pending*, Southwestern Bell Corp. v. FCC, D.C. Circuit No. 87-1764 (filed December 14, 1987).

[16] The two decisions cited are Memorandum Opinion and Order in Docket No. 83-1145, Phase II, FCC 84-292 (released February 14, 1985) *(Docket No. 83-1145 Order)*, and Guidelines for Dominant Carriers' MTS and Rate Structure Plans, 50 Fed. Reg. 42,945 (October 23, 1985) *(Guidelines Order)*. *See Waiver Order* at n. 10.

[17] Decreased Regulation of Certain Basic Telecommunications Services, 2 FCC Rcd 645 (1987) at paras. 17 and 22.

[18] Telenet Application at 5-6.

[19] BellSouth Corporation on Behalf of Southern Bell Telephone and Telegraph Company, Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations to Authorize Protocol Conversion Offerings, Mimeo No. 3489 (released April 1, 1986).

[20] BellSouth Corporation on Behalf of Southern Bell Telephone and Telegraph Company, Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations to Authorize Protocol Conversion Offerings, 3 FCC Rcd 6961 (1988) *(BellSouth Order), petition for recon. pending.*

[21] *See* Letter of December 28, 1988, from John Cimko, Jr., Chief, Tariff Division, Common Carrier Bureau, to Martin E. Grambow, Executive Director - Federal Regulatory, Southwestern Bell Corp.

[22] It is not certain that we must now address Telenet's application in this regard. In the December 28, 1988 letter to Southwestern revoking the cross-referencing waiver, the Bureau again waived Secton 61.38 of the Rules to relieve Southwestern of the requirement that it provide detailed cost and demand projections with the federal tariff filing. Telenet did not request review of the Dec. 28 waiver, which essentially replaced the waiver described herein. However, in view of Telenet's assertion that this matter "lies at the heart" of its concern (application at 6), we will address its objection to that aspect of the *Waiver Order.*

[23] *BellSouth Order,* 3 FCC Rcd at 6962. We noted that in 1985, Telenet and Tymnet controlled 67 percent of the market. *Id* at n. 10.

[24] Approval for these new services must be obtained under our *Computer III rules. See Computer III Phase I Order, supra* note 2, 2 FCC Rcd at 3078.

[25] *See* Telenet's "Comments Upon Compliance Filing," filed July 28, 1986, at 5, n. 8. The state tariffs are contained in Appendix D to Southwestern's compliance filing.

[26] Southwestern Bell Telephone Co., Plan for Comparably Efficient Interconnection of Enhanced Services Providers for Protocol Conversion Services, 4 FCC Rcd 2236 (Com. Car. Bureau 1989).

[27] *Joint Cost Order,* 2 FCC Rcd at 1312, para. 109. *See* 47 C.F.R. §64.901.

[28] *Id.* at 1328 n. 355.

[29] Southwestern Bell Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 4 FCC Rcd 3388 (Com. Car. Bureau 1989).

[30] *Computer III Phase II Order,* 3 FCC Rcd at 1156.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-622

In the Matter of

Amendment of Parts 80 and 87 of the Commission's Rules to modify and clarify the technical characteristics of emergency position indicating radiobeacons and emergency locator transmitters in the maritime and aviation services. RM-6578

NOTICE OF PROPOSED RULE MAKING

Adopted: December 20, 1989; Released: January 10, 1990

By the Commission:

I. INTRODUCTION

1. This *Notice of Proposed Rule Making* (*Notice*) proposes to amend Parts 80 and 87 of the Commission's Rules, 47 C.F.R. Parts 80 and 87, to modify and clarify the rules pertaining to the technical characteristics of emergency position indicating radiobeacons (EPIRBs) and emergency locator transmitters (ELTs) that operate on 121.500 MHz and 243.000 MHz. We are initiating this rule making proceeding in response to a petition filed by the Radio Technical Commission for Maritime Services.

II. BACKGROUND

2. EPIRBs and ELTs are small battery powered transmitters used to send a distress signal. EPIRBs are carried on ships while ELTs are carried on aircraft. They may be activated automatically or manually. The transmitted distress signal is identical for EPIRBs and ELTs. The distress signal is used both as an alarm to alert others that the ship or aircraft is in distress and as a beacon to aid in its location by search and rescue personnel.

3. The distress signal may be received by overflying aircraft, nearby ship stations if they are monitoring the distress frequency and are within range of the EPIRB or ELT, or by low orbiting satellites that are part of the COSPAS-SARSAT system.[1] When received by the COSPAS-SARSAT satellite system the transmitted distress signal is retransmitted in its entirety to a ground station. The ground station measures the Doppler shift of the carrier frequency transmitted by the EPIRB or ELT, processes the Doppler shift using digital signal processing techniques in correlation with the satellite's position in orbit and arrives at a probable location on the earth's surface.

4. In a recent proceeding, the Commission released a *Report and Order* [2] (*Order*) modifying the technical standards for EPIRBs and ELTs to enhance detection by satellite receivers. Briefly, this "spectral enhancement" requires EPIRBs and ELTs manufactured after October 1, 1988, to have a percentage of the transmitted power concentrated about the carrier during each audio sweep and requires them to maintain frequency stability when the modulation changed. [3] The Order incorporated by reference, Federal Aviation Administration (FAA) Technical Standard Order (TSO) Document TSO-C91a titled "Emergency Locator Transmitter (ELT) Equipment" dated April 29, 1985.

III. PROPOSAL

5. We have before us a Petition for Rule Making filed by the Radio Technical Commission for Maritime Services (RTCM) to further clarify the EPIRB rules (RTCM Petition). Public Notice was given on November 14, 1988 (Report No. 1758). RTCM notes that Section 80.1053(a)(7) of the Commission's Rules, 47 C.F.R. § 80.1053(a)(7), requires EPIRB emissions to be in accordance with FAA TSO-C91a. According to RTCM, however, TSO-C91a does not specify types of emissions.[4] Additionally, RTCM points out that TSO-C91a requires sidebands that are symmetric about the output signal spectrum but that such symmetry is not necessary for improved detection by the COSPAS-SARSAT system.[5] Finally, RTCM states that TSO-C91a incorporates the Radio Technical Commission for Aeronautics (RTCA) document, No. RTCA/DO-183, "Minimum Operational Performance Standards for Emergency Locator Transmitters" (DO-183). Because TSO-C91a is incorporated into Section 80.1053(a)(7) of the rules, so is document DO-183. RTCM contends that the reference to aeronautical service documents TSO-C91a and parts of DO-183 is inappropriate for EPIRBs and should be removed from Part 80[6] and replaced with the applicable technical standards. The National Aeronautics and Space Administration (NASA) filed comments supporting the RTCM petition (NASA Comments). NASA agreed that the requirement of TSO-C91a for symmetric sidebands on ELTs does not improve detection by the COSPAS-SARSAT system.[7]

6. RTCM also notes that the requirement for 30 per cent of the total power to be contained within ± 30 Hz and ± 60 Hz of the reference carrier on 121.500 MHz and 243.000 MHz beacons, respectively, contained in Section 80.1053(a)(8) applies only to A3N emission.[8] RTCM recommends that the requirement to have 30 per cent of the total power within ± 30 Hz and ± 60 Hz for 121.500 MHz and 243.000 MHz, respectively, be modified to apply to all emissions regardless of whether they have modulation.[9] NASA notes that the requirement to have 30 per cent of the power centered about the carrier for all emissions would improve detection by the COSPAS-SARSAT system.[10]

7. RTCM states that there are substantial variations in the ability of many EPIRBs manufactured in past years to be detected by the COSPAS-SARSAT system. NASA conducted field tests of EPIRBs with and without distinct carrier components and concluded that EPIRBs without distinct carriers separate from the modulating sidebands would experience significant negative impact on their ability to be received by the COSPAS-SARSAT system compared to EPIRBs with distinct carriers.[11] Additionally,

improvements in the computed location of EPIRBs and ELTs are directly related to carrier frequency stability.[12] RTCM suggests, therefore, that EPIRBs that meet the new modulation characteristics be labeled in such a manner that individuals purchasing EPIRBs will be able to identify those EPIRBs with the improved satellite detection capability.[13] The requirement to label EPIRBs is supported by NASA.[14] The United States Coast Guard (USCG) filed comments (USCG Comments) supporting RTCM's petition and stated that requiring the labeling of EPIRBs that meet the improved satellite detection characteristics would be an important addition to the Commission's Rules.[15]

8. The USCG suggested making the changes proposed by RTCM administratively rather than through a rule making proceeding.[16] Additionally, the USCG states that it is unclear whether changes made by manufacturers to comply with the power distribution requirements for EPIRBs will require a new application for type acceptance and requests that the Commission issue guidance to manufacturers concerning type acceptance for modified EPIRBs.[17]

9. In a separate but related matter, the National Transportation Safety Board (NTSB) recommended changes to the Commission's EPIRB Rules. As a result of its investigation into the sinking of the fishing vessel WAYWARD WIND[18] NTSB recommends that the Commission require labeling all newly manufactured EPIRBs with battery installation directions; the elimination of water activated batteries in EPIRBs that do not float;[19] and, establishing an inspection program for EPIRBs.[20] *See* National Transportation Safety Board Safety Recommendation M-89-6 through -8 dated February 1, 1989.

IV. DISCUSSION

10. The proposals before us are intended to improve performance, clarify and eliminate unnecessary rules, and allow users to identify EPIRBs and ELTs that meet the requirements for improved satellite detection. Because EPIRBs and ELTs are life saving devices used worldwide, it is vitally important that our rules permit them to operate as effectively as possible and to ensure that when the devices are activated, search and rescue teams will detect the distress signal and locate the ships or aircraft in distress. Further, we believe the public interest will be better served through a broader rule making proceeding inviting public comment on modification and clarification of EPIRB and ELT rules rather than an administative proceeding incorporating the RTCM petition as suggested by the USCG. We have taken similar steps in the past to improve EPIRB and ELT operation and believe the public interest will be served if we do so again.

11. In Docket 87-133 we modified the carrier power requirements for EPIRBs and ELTs when operating with an A3N emission to improve detection. While all EPIRBs and ELTs are required to operate with A3N emission, they are permitted to use other emissions as well. RTCM and NASA supported extending the carrier power requirements to all emissions. We agree. This should increase the likelihood that EPIRBs and ELTs, regardless of the type of emission used to transmit a distress signal, will be detected. Therefore, we propose that newly manufactured EPIRBs and ELTs meet the carrier power requirements adopted in PR Docket 87-133 for an A3N emission for all emissions irrespective of whether there is modulation present.

12. We are also proposing that the 121.500 MHz "homing" transmitter required as part of the 406 MHz EPIRB[21] meet the same carrier power characteristics. Although the 121.500 MHz homer is restricted in power to 25 mW[22] and is intended to be used by search and rescue personnel for close in direction finding, the USCG and FAA have indicated that requiring the "homing" transmitter to meet the carrier power characteristics for improved satellite detection adopted in PR Docket 87-133 could result in its detection by the COSPAS-SARSAT system and increase the likelihood of lives being saved. We seek specific comments regarding the proposed output power characteristics for the 121.500 MHz "homing" transmitter required as part of the 406.025 MHz EPIRB.

13. We are also proposing to extend the carrier power characteristics to all Class S EPIRBs. Currently, only Class S EPIRBs that float must meet the improved satellite detection requirements. Class S EPIRBs not required to float do not have to comply with the improved satellite detection requirements. Because Class S EPIRBs are intended specifically for stowage on survival craft for use in potentially life threatening situations we propose that both types must meet the improved satellite detection requirements to increase the likelihood that the distress signals transmitted will be received by the COSPAS-SARSAT system.

14. Additionally, we are proposing to require that EPIRBs using water activated batteries must float. EPIRBs that use water activated batteries and do not float are potentially unsafe since they have to be in the water to operate and, if not buoyed properly, will sink. Further, we are proposing rules requiring that the battery installation instructions be displayed on the EPIRB case. As previously noted by the NTSB an improperly installed battery can affect how an EPIRB floats. Requiring battery installation instructions on a label will reduce the incidence of improperly installed batteries and increase their effective operation in an emergency.

15. We are proposing rules that eliminate all reference to FAA documents TSO-C91a and DO-183 from the EPIRB rules in Part 80. Those documents are specific to ELTs and are not applicable for EPIRBs. Further, the elimination of reference to TSO-C91a and DO-183 in the EPIRB rules removes the requirement for EPIRBs to have symmetric sidebands as requested by RTCM. Also, we are proposing rules eliminating the requirement that ELTs have symmetric sidebands centered about the carrier frequency 121.500 MHz and 243.000 MHz. As previously noted, NASA stated that symmetric sidebands do not enhance detection by the COSPAS-SARSAT system and do not appear to be necessary.

16. In order to reduce the burden of testing EPIRBs for type acceptance, we are proposing that the reduced radiation level required for the Class A EPIRB test switch be measured at 30 meters (98 feet) and referenced as a power level instead of the current 46 meters and field strength. *See* Section 80.1053(b)(3), 47 C.F.R. § 80.1053(b)(3). There is no change in the technical standard, and we believe that this testing will be less burdensome on EPIRB manufacturers. Further, to be consistent with the Safety Convention requirement for drop tests of EPIRBs from 20 meters we are proposing that Class A EPIRBs meet the technical requirements after free fall into water

from 20 meters rather than the current 18 meters. This is consistent with our current rules for Class S EPIRBs and the requirements for the 406 MHz EPIRBs. We have also rewritten and reorganized a number of the rules pertaining to EPIRBs to simplify and clarify the existing requirements.

17. In a companion item to this rule making proceeding the Commission is proposing a revised test procedure for EPIRBs. *See* General Docket 89 -(Add when received from OET). Newly manufactured EPIRBs must meet the requirements of this test procedure prior to a grant of type acceptance. Newly manufactured ELTs must meet certain parts of this test procedure prior to a grant of type acceptance. Copies of the proposed test procedure may be obtained from the Commission's copy contractor. *See* Section 0.465, 47 C.F.R. § 0.465.

18. Finally, we are proposing rules regarding the labeling of EPIRBs and ELTs that meet the improved satellite detection requirements for carrier power characteristics to identify for the maritime and aviation consumer those devices that will improve the likelihood that the COSPAS-SARSAT system will detect a distress signal.

V. PROCEDURAL MATTERS

19. In accordance with Section 605 (b) of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605 (b), the Commission certifies that these rules would not, if promulgated, have a significant economic impact on a substantial number of small entities. The changes proposed herein will have some beneficial effect on the maritime and aviation communities by improving the lifesaving capability of the COSPAS-SARSAT system by improving the detection and accurate location of an activated EPIRB or ELT. We estimate that the cost to manufacturers would be less than $2.00 per unit to incorporate the proposed changes.

20. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* 47 C.F.R. § 1.1203.

21. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* 47 C.F.R. § 1.1202(b). Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See* 47 C.F.R. § 1.1206.

22. Authority for issuance of this *Notice* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **March 5, 1990** and reply comments on or before **March 20, 1990.** The Commission will consider all relevant and timely comments before taking final action in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554.

23. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease the burden hours imposed on the public.

24. The Commission hereby certifies pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), that these rules, if promulgated, will not have a significant economic impact on a substantial number of small entities.

25. It IS ORDERED that a copy of this Notice shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Parts 80 and 87 of Chapter I of Title 47 of the Code of Federal Regulations are proposed to be amended as follows:

A. Part 80 - STATIONS IN THE MARITIME SERVICES.

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U. S. C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064 - 1068, 1081-1105, as amended; 47 U. S. C. 151-155, 301 - 609 ; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. Section 80.223 is amended by revising paragraph (d) to read as follows:

§ 80.223 Special Requirements for survival craft stations.

* * * * *

(d) Any EPIRB carried as part of a survival craft station must comply with the specific technical and performance requirements for its class contained in Subpart V of this Chapter.

3. Section 80.1053 is amended by revising paragraphs (a)(7), (a)(8), (a)(12), (b)(3), (c), and (e) to read as follows:

§ 80.1053 Special Requirements for Class A EPIRB stations.

(a) * * *

(7) The mandatory A3N emission must be amplitude modulated with an audio signal swept downward between 1600 and 300 Hz. The sweeping range of the audio signal must be 700 Hz or greater. Its sweep rate must be between 2 and 4 times per second. The modulation factor must be at least .85 and the modulation duty cycle must be at least 33%, but not more than 55%. The optional A3E emission must comply with the modulation factor and duty cycle.

(8) EPIRBs manufactured on or after October 1, 1988; EPIRBs carried as part of a ship station to satisfy USCG equipment carriage requirements that are newly installed on or after April 1, 1989; EPIRBs carried as part of a ship station to satisfy USCG equipment carriage requirements on or after August 1, 1991; and, EPIRBs that are newly installed as part of a voluntarily equipped ship station after August 1, 1991, must have a clearly defined carrier frequency distinct from the modulation sidebands for the mandatory emission, A3N, and, if used, the A3E or N0N emissions. On 121.500 MHz at least thirty per cent of the total power emitted during any transmission cycle with or without modulation must be contained within plus or minus 30 Hz of the carrier frequency. On 243.000 MHz at least thirty per cent of the total power emitted during any transmission cycle with or without modulation must be contained within plus or minus 60 Hz of the carrier frequency. Additionally, if the type of emission is changed during transmission the carrier frequency must not shift more than plus or minus 30 Hz on 121.500 MHz and not more than plus or minus 60 Hz on 243.000 MHz. The long term stability of the carrier frequency must comply with the requirements in section 80.209(a).

* * * * *

(12) Meet the requirements of paragraphs (a)(1) through (9) of this section after a free fall into water 3 times from a height of 20 meters (67 ft.);

* * * * *

(b) * * *

(3) Reduce radiation to a level not to exceed 100 nanowatts at a distance of 30 meters (98 feet) irrespective of direction.

(c) EPIRBs manufactured on or after October 1, 1988, must be tested in accordance with the Office of Engineering Technology Test Procedure, OET TP-8, "FCC Procedure for Testing Emergency Position Indicating Radiobeacons (EPIRBs)". A report of the measurements must be submitted with each application for type acceptance. EPIRBs that meet the output power characteristics of this section must have a permanent label prominently displayed on the outer casing stating, "Meets FCC Rules for improved satellite detection." This label, however, must not be placed on the equipment without authorization to do so by the Commission. Such authorization may be applied for either by submission of a new application for type acceptance accompanied by the required fee and all information and test data required by Parts 2 and 80 of this Chapter or, for EPIRBs type accepted prior to October 1, 1988, a letter requesting such authorization, including appropriate test data and a showing that all units produced under the original type acceptance authorization comply with the requirements of this paragraph without change to the original circuitry. The modulation, power and frequency stability requirements specified in paragraphs (a)(6), (a)(7) and (a)(8) of this section must be met under the environmental test conditions specified in the FCC test procedure OET TP-8.

(d) * * *

(e) EPIRBs must be powered by a battery contained within the transmitter case or in a battery holder that is rigidly attached to the transmitter case. The battery connector must be corrosion resistant and positive in action and must not rely for contact upon spring force alone. The useful life of the battery is the length of time that the battery can be stored under marine environmental conditions without the EPIRB transmitter output power falling below 75 milliwatts prior to 48 hours of continuous operation. The month and year of the battery's manufacture must be permanently marked on the battery and the month and year upon which 50 percent of its useful life will have expired must be permanently marked on both the battery and the outside of the transmitter. The batteries must be replaced if 50 percent of their useful life has expired or if the transmitter has been used in an emergency situation. EPIRBs manufactured after*(one year from the effective date of this rule making)* must have the battery installation instructions displayed prominently on the outer case.

* * * * *

4. Section 80.1055 is amended by revising paragraph (a)(3) to read as follows:

§ 80.1055 Special requirements for Class B EPIRB stations.

(a) * * *

(3) Meet the requirements in § 80.1053(a)(4) through (8), (a)(14), and (c) through (i). EPIRBs with water activated batteries must, additionally, meet the requirements contained in § 80.1053(a)(10) and (a)(11);

* * * * *

5. Section 80.1059 is amended by revising paragraphs (d)(3) and (d)(4) to read as follows:

§ 80.1059 Special requirements for Class S EPIRB stations.

* * * * *

(d) * * *

(3) Meet the requirements in § 80.1053 (a)(4) through (a)(8) and (b) through (i);

(4) Class S EPIRBs may provide either continuous or intermittent operation. If the EPIRB is designed for intermittent operation, the duty cycle must be 50 per cent and the period two minutes plus or minus 12 seconds. In either event, the EPIRB must meet the power output characteristics described in § 80.1053(a)(8);

* * * * *

6. Section 80.1061 is amended by revising paragraph (b) to read as follows:

§ 80.1061 Special requirements for 406. 025 MHz EPIRBs.

* * * * *

(b) The 406.025 MHz EPIRB must contain as an integral part a "homing" beacon operating only on 121.500 MHz that meets all the requirements described in the RTCM Recommended Standards document described in paragraph (a) of this section. The 121.500 MHz "homing" beacon must have a continuous duty cycle that may be interrupted during the transmission of the 406.025 MHz signal only. Additionally, at least 30 per cent of the total power emitted during any transmission cycle must be contained within plus or minus 30 Hz of the carrier frequency.

* * * * *

B. Part 87 - AVIATION SERVICES

1. The authority for Part 87 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U. S. C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. Section 87.141 is amended by revising paragraphs (g), (h) and (i) to read as follows:

§ 87.141 Modulation requirements.

* * * * *

(g) Except that symmetric sidebands are not required, the modulation characteristics for ELTs must be in accordance with the specifications contained in the Federal Aviation Administration (FAA) Technical Standard Order (TSO) Document TSO-C91a titled "Emergency Locator Transmitter (ELT) Equipment" dated April 29, 1985. TSO-C91a is incorporated by reference in accordance with 5 U.S.C. 552(a). TSO-C91a may be obtained from the Department of Transportation, Federal Aviation Administration, Office of Airworthiness, 800 Independence Avenue S.W., Washington, DC 20591.

(h) ELTs must use A3N emission and may use A3E or NON emissions on an optional basis while transmitting. Each transmission of a synthesized or recorded voice message from an ELT must be preceded by the words "this is a recording"; transmission of A3E or NON emission must not exceed 90 seconds; and any transmission of A3E or NON emissions must be followed by at least three minutes of A3N emission.

(i) ELTs manufactured on or after October 1, 1988, must have a clearly defined carrier frequency distinct from the modulation sidebands for the mandatory emission, A3N, and, if used, the A3E or NON emissions. On 121.500 MHz at least thirty per cent of the total power emitted during any transmission cycle with or without modulation must be contained within plus or minus 30 Hz of the carrier frequency. On 243.000 MHz at least thirty per cent of the total power emitted during any transmission cycle with or without modulation must be contained within plus or minus 60 Hz of the carrier frequency. Additionally, if the type of emission is changed during transmission, the carrier frequency must not shift more than plus or minus 30 Hz on 121.500 MHz and not more than plus or minus 60 Hz on 243.000 MHz. The long term stability of the carrier frequency must comply with the requirements in § 87.133.

3. In Section 87.147, paragraph (b) and (c) are redesignated as paragraphs (c) and (d), and a new paragraph (b) is added to read as follows:

§ 87.147 Type acceptance of equipment.

* * * * *

(b) ELTs manufactured after October 1, 1988, must meet the output power characteristics contained in paragraph 87.141(i) of this section when tested in accordance with the Signal Enhancement Test, contained in the Office of Engineering Technology Test Procedure, OET TP-8, "FCC Procedure for Testing Emergency Position Indicating Radiobeacons (EPIRBs)". A report of the measurements must be submitted with each application for type acceptance. ELTs that meet the output power characteristics of this section must have a permanent label prominently displayed on the outer casing stating, "Meets FCC Rules for improved satellite detection." This label, however, must not be placed on the equipment without authorization to do so by the Commission. Such authorization may be applied for either by submission of a new application for type acceptance accompanied by the required fee and all information and test data required by Parts 2 and 87 of this Chapter or, for ELTs type accepted prior to October 1, 1988, a letter requesting such authorization, including appropriate test data and a showing that all units produced under the original type acceptance authorization comply with the requirements of this paragraph without change to the original circuitry.

* * * * *

FOOTNOTES

[1] SARSAT stands for search and rescue satellite-aided tracking. COSPAS is an acronym for a Russian phrase meaning space system for search of distressed vessels.

[2] Report and Order, PR Docket No. 87-133, 3 FCC Rcd 1027 (1988).

[3] Thirty per cent of the total power emitted during an audio sweep cycle, for A3N emission, is required to be within +/- 30 Hz and +/- 60 Hz of the carrier frequencies 121.500 MHz and 243.000 MHz, respectively. The carrier frequency is required to be maintained within +/- 30 Hz when operating at 121.500 MHz and +/- 60 Hz when operating at 243.000 MHz when the type of modulation changed. *See generally,* Section 80.1053 of Commission's Rules, 47 C.F.R. § 80.1053.

[4] *RTCM Petition* at 2-3.

[5] *Id.* at 3.

[6] *Id.* at 2-3.

[7] NASA Comments at 1.

[8] RTCM Petition at 3.

[9] *Id.* at 5.

[10] NASA Comments at 2.

[11] International Radio Consultative Committee, Draft Report V/8, "Power Distribution Requirements for EPIRBs Operating on the Frequencies 121.5 MHz and 243 MHz." (Question 31-3/8)

[12] Improved location is a direct result of a stable carrier frequency. The Doppler shift used in calculating the location of an EPIRB or an ELT is caused by the polar orbiting satellite in the COSPAS-SARSAT system intercepting the distress signal at a high rate of speed. The received frequency is shifted from the expected carrier frequency and is received as a change in frequency. The algorithm used to compute position cannot distinguish between shifts in transmitted carrier frequency and Doppler shifts. Therefore, changes in the transmitted frequency when changing types of modulation could affect the computed location of an EPIRB or ELT, and the Rules require frequency stability during changes in modulation.

[13] *Id.* at 6-7.

[14] NASA comments at 2.

[15] USCG Comments at 1.

[16] *Id.*

[17] *Id.* at 2.

[18] The WAYWARD WIND capsized in the Gulf of Alaska. NTSB stated in its safety recommendation to the Commission that it believes that the EPIRB transmitted effectively and that its use saved two lives. The NTSB found, however, that the EPIRB battery was installed improperly and caused the EPIRB to float on its side.

[19] Class S EPIRBs, which are designed to attach to a life raft or survival craft, and Class B EPIRBs do not have to float. *See* respectively, Sections 80.1059(c) and 80.1055(a)(3) of the Rules, 47 C.F.R. §§ 80.1059(c) and 80.1055(a)(3).

[20] The Commission's Office of Engineering and Technology currently administers an equipment authorization program that tests individual models of EPIRBs for compliance with FCC rules and, additionally, conducts a program of post-grant sampling of type accepted EPIRBs.

[21] *See,* generally Section 80.1061 of the Commission's Rules, 47 C.F.R. § 80.1061.

[22] RTCM Recommended Standards for 406 MHz Satellite Emergency Position-Indicating Radiobeacons (EPIRBs), 2-4.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL EXCHANGE CARRIER ASSOCIATION, INC., et al.

AAD 9-1936

Joint Petition for Waiver of Sections 36.611(a), 36.631(c) and 36.641(b)(3) of the Commission's Rules

ORDER

Adopted: December 28, 1989; Released: December 29, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On August 29, 1989, the National Exchange Carrier Association (NECA) and four local exchange carrier (LEC) trade associations[1] filed a Joint Petition for Waiver of three sections of the Commission's Universal Service Fund (USF) rules.[2] The petitioners request that we waive Sections 36.631(c) and 36.641(b)(3) of the Commission's rules, which specify the manner in which NECA determines the size and distribution of the USF, to ensure that USF receipts for certain carriers do not decrease during the 1989-92 period. The petitioners also request that we waive Section 36.611(a), which specifies June 30 as the date on which the LECs must submit USF cost data to NECA, and establish (for 1990) a May 1 submission date. For the reasons discussed below, we deny both of the petitioners' requests.

II. BACKGROUND

2. The Commission adopted the USF rules to promote universal service by providing a larger interstate separations allocation for high cost carriers, thereby enabling them to maintain affordable local rates. The USF rules are being implemented concurrently with new jurisdictional separations rules for loop plant. Both sets of rules, when fully implemented, will have a substantial impact on the apportionment of local loop costs. To ease this impact, the Commission adopted an eight-year transition period, from 1986 to 1993, for full implementation. The USF rules increase the interstate cost allocation for certain high cost carriers, thereby ameliorating the pressure for increased local rates.

3. In accordance with Section 36.611(a), all LECs must submit end-of-year cost data for the prior year to NECA on June 30th of each year. These data identify the unseparated depreciation, maintenance and overhead expenses associated with loop plant. Based on these data, NECA calculates the cost per working loop for each LEC study area. In accordance with Sections 36.631 and 36.641, NECA uses these loop cost calculations to determine the appropriate assistance amount for each qualifying study area. It submits these results and the supporting data in a report [3] to the Commission on September 1 of each year. NECA bills interexchange carriers each month to collect the fund, and it disburses this fund to LECs serving the qualifying study areas.

4. In July 1987, members of the LEC industry formed a task force[4] to study the impact of the Commission's recently adopted Uniform System of Accounts (USOA)[5] and jurisdictional separations rules[6] on the USF program. Both sets of rules became effective on January 1, 1988. On September 1, 1989, NECA filed the Task Force Report, which provided data purportedly supporting the waiver request.

III. JOINT PETITION

5. The petitioners request that we waive Sections 36.631(c) and 36.641(b)(3) in 1990, 1991 and 1992 to ensure that high-cost study areas with fewer than 200,000 working loops receive no less assistance during each of these years than they are receiving in 1989. The petitioners estimate that, absent this waiver, 203 study areas will experience a reduction of USF assistance of $12 million over the 1990-1992 period.

6. The petitioners claim the reduced level of USF assistance for these carriers is due generally to the Commission's new accounting and separations rules and the Commission's depreciation prescription program. They suggest that two specific Commission actions have had a particularly adverse impact on the USF payments for small carriers: the Commission's decision in the *Part 36 Conformance Order* [7] to exclude Revenue Accounting Expenses from the USF calculation and the decision to amortize depreciation reserve deficiencies of the large LECs.[8]

7. In the former case, the petitioners claim that the smaller high cost carriers have higher than average revenue accounting costs. They therefore argue that the exclusion of such costs will decrease the difference between their costs and the nationwide average costs, thereby reducing USF support. In the latter case, the petitioners claim that the Commission's approval of reserve deficiency amortizations for large carriers increases the nationwide average loop costs. They therefore argue that this change reduces the difference in loop costs between the smaller carriers and the nationwide average, thereby reducing the USF support for smaller carriers.

8. The petitioners believe a three-year waiver is needed to add stability to the USF process and to maintain the levels of support that the Commission had originally intended. They estimate that the waiver would increase the fund by $6.4 million in 1990, $3.7 million in 1991, and $2.6 million in 1992. The petitioners also request that, for 1990, we waive Section 36.611(a) and require the LECs to submit USF cost data to NECA on May 1 instead of June 30. They claim this two-month advance is needed to provide both the industry and the Commission additional

time in 1990 to test alternatives to the current USF rules against a second set of data developed under the Part 32 and Part 36 rules. They believe such a test may indicate that a permanent revision of the USF rules is warranted.

IV. COMMENTS

9. On September 21, 1989, we invited interested parties to comment on the waiver request.[9] Eleven parties filed comments.[10] All but one are LECs or LEC consultants. This group endorses the petitioners' requests. The one exception is MCI. MCI opposes the petitioners' request that we waive the Commission rules to guarantee minimum levels of assistance in 1990-1992 but supports the petitioners' request to advance the data filing date by two months in 1990.

10. The LECs and LEC consultants argue that, absent grant of the waiver, the USF support payments for many small LECs will drop precipitously in 1990,[11] thereby exacerbating the pressure for local rate increases. They argue that this result is inconsistent with the Commission intention regarding the USF program. They further argue that grant of the waiver is a relatively inexpensive, simple and effective temporary solution to the problem.[12] They believe that, when more data are available, a more effective permanent solution can be developed.[13]

11. In addition, TCA claims that the 1988 USF data, on which the 1990 assistance amounts are based, do not provide an accurate picture of each LEC's costs. TCA states that, because LECs were required to submit these data on May 1 of 1989, many LECs had not completed their 1988 cost studies, which are necessary to identify accurately the amounts of loop-related plant in each study area. TCA further states that, because these cost studies were incomplete, many LECs could not perform their final review of accounting records to ensure that the 1988 changes in accounting rules had been properly implemented. TCA believes that, in many study areas, the USF data do not correctly reflect the amounts of loop-related plant or the new accounting rules. Finally, TCA proposes that End User Service Order Processing costs be included in the loop costs, to compensate for the reduction in loop costs caused by the exclusion of revenue accounting expenses.[14]

12. MCI states that the petitioners fail to provide any specific factual information showing that LECs will suffer significant financial harm under the current USF rules. It further states that the petitioners fail to demonstrate that the Commission's policy objectives underlying the USF rules would be frustrated if the waiver were not granted. Accordingly, it believes interexchange carriers should not be forced to pay an additional $12 million without a strong showing that such assistance is actually needed. MCI contends that the desire of certain LECs to retain a guaranteed stream of subsidies is an insufficient basis on which to alter the existing payment formula specified by the rules. It would not be rational, MCI states, for study areas to continue to receive the same amounts of assistance when their loop costs decrease.

13. In its reply, NECA reiterates its position that grant of the waiver is necessary to correct problems caused to the USF program by the Commission's adoption of new USOA and separations rules. It also emphasizes that, contrary to MCI's comment, the reduction in USF support for the 203 carriers results from changes in cost allocations, not reduction in costs.

V. DISCUSSION

A. Request for Guaranteed Minimum Amounts of Assistance

14. Although the petitioners and the majority of the commenters claim that the USF rules are not working as intended, they have provided little evidence to support this position. The parties primarily rely on the 1989 NECA USF Report[15] which shows that an estimated 203 study areas will experience a total reduction in support payments of approximately $6 million. NECA's recent update of this report notes, however, that the USF is expected to increase by $73 million in 1990, an increase of 27 percent over 1989.[16]

15. This increase is more than would be expected in the fifth year of the eight-year transition of the USF program.[17] Moreover, these data indicate that some study areas will be receiving $79 million more support in 1990 than in 1989. Significantly, no party suggests that the rules are not working for these study areas or that their 1990 support payments should be adjusted downward to the 1989 levels.

16. As to the study areas experiencing support reductions, we conclude that their reductions are likely caused not by any deficiency in the USF rules, but rather by inaccurate data. We reached this conclusion after throughly analyzing the data submitted by NECA and the petitioners.[18] Our analysis focused on two groups of carriers: a group of ten study areas whose 1990 USF support payment reductions are expected to be most severe[19] and a group of about 490 small companies.

17. In examining the 1987 and 1988 cost data[20] of the ten study areas experiencing the greatest impacts, we found anomalies that are not explained by the petitioners and, we believe, that cannot be explained by any Commission action. One study area, for example, is shown to have an average cost per loop *below* the nationwide average in 1988 even though it had been *double* the nationwide average in 1987. The average cost per loop is shown to decrease by over $200 in a single year. As to the other nine severely affected study areas, the decreases range from $90 to $460, with an average of $140.

18. Contrary to the petitioners' claims, decreases of this magnitude cannot be due primarily to the new treatments of revenue accounting costs and depreciation reserve imbalance amortizations. Neither of these changes is shown to have a sufficiently large effect on the relative costs of small study areas to be a primary cause of such large reductions in assistance.[21] The most likely explanation, we believe, is that these study areas reported 1987 costs that are too high or reported 1988 costs that are too low.

19. In examining the 1987 and 1988 cost data of the 490 companies with annual revenues under $40 million, we found that an extremely large reduction ($103) in average loop costs occurred between these two years. We also found that the vast majority of this reduction was due to network plant related costs, such as maintenance, taxes, and return. This result is important because the Commission did not make changes in the Part 32 or Part 36 Rule Makings that would produce substantial shifts in such costs.[22] We therefore believe the most likely source of these apparent cost reductions is inaccurate data. We note that TCA's comments support this conclusion. TCA states

that the 1988 loop cost data were inaccurate for many LECs because they had not completed their separations cost studies in time for the May filings.[23]

20. Against this background, we conclude that the petitioners have not supported their contention that rule changes have produced unanticipated and unintended consequences sufficient to support a waiver. As noted previously, our examination of the record indicates that the most likely source of the petitioners' projected USF reductions over the next several years is not our rules but, instead, can be found in deficiencies in the petitioners' cost studies. Deficiencies of this nature do not provide an adequate legal basis for waiving the Commission's rules.

21. In keeping with the Commission's longstanding sensitivity to the concerns of small companies, we encourage all of the petitioners to reexamine their 1987 and 1988 cost data to determine the causes of the apparent deficiencies we have identified in these data and forward corrections to NECA, which may then refile its petition, if appropriate. Carriers experiencing difficulty with this process, or who may find a need for assistance in implementing our rules, are encouraged to seek assistance from NECA, which the Commission created for the express purpose of helping small carriers prepare and file interstate tariffs, including the cost studies that support such filings.[24] Carriers also may request assistance from the Accounting and Audits Division of this Bureau.

B. Request for Advance of 1990 Data Submission

22. The petitioners argue that the 1990 submission date for USF data should be advanced to May 1 to provide the industry additional time to study 1990 data submissions before recommending a permanent solution to the fund's alleged instability problem. For several reasons, however, such an advance would be inappropriate. First, the petitioners concede that, because NECA has collected only a single year of cost data under the Part 32 and Part 36 rules, there is insufficient evidence to conclude that the USF rules yield unstable results. They also concede that the industry task force, after studying this matter for more than two years, and after being granted an advance in the 1989 submission date, is unable to identify any problematical element in the USF rules. We believe no basis has been provided to advance the submission schedule to attempt to fix a problem that has not been shown to exist.

23. Second, such an advance would likely contribute to lack of accuracy of the data submissions, because LECs generally will not have completed their separations studies of 1989 end-of-year costs by the May 1 date sought by the petitioners.[25] Consequently, if LECs are required to submit these data before their separations studies are complete, they must rely on older studies or some other less accurate method of estimation.

24. Finally, if widespread industry support for an early submission date exists, as the petitioners and commenters suggest, we believe a mandatory advance is unnecessary. The rules will not prevent LECs from voluntarily submitting their USF data two months early at NECA's request. And if widespread industry support does not exist, we see no reason to impose such a burden on the industry, given the lack of evidence that it would be useful. We therefore deny the Petitioners' request for an advance of the 1990 required submission date.

VI. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), That the Joint Petition for Waiver of Sections 36.611(a), 36.631(c) and 36.641(b)(3) of the Commission's Rules and Regulations IS DENIED.

26. IT IS FURTHER ORDERED, That this *Order* is issued pursuant to Section 0.291 of the Commission's Rules. 47 C.F.R. Sec. 0.291. Applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. Sec. 1.115, may be filed within thirty days from the date of the public notice of this *Order*. *See* 47 C.F.R. Sec. 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] National Rural Telecom Association (NRTA), National Telephone Cooperative Association (NTCA), Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), and United States Telephone Association (USTA).

[2] 47 C.F.R. Sections 36.611(a), 36.631(c) and 36.641(b).

[3] Universal Service Fund Submission of Study Results by the National Exchange Carrier Association (NECA USF Report).

[4] The Industry Task Force includes twenty-one representatives of the telephone industry trade associations, Bell Operating Companies, independent telephone companies, telephone consulting firms, and NECA. These representatives are identified in the Report of Industry Task Force on Universal Service Fund (Task Force Report), filed September 1, 1989, at note 2.

[5] 47 CFR Part 32.

[6] The Commission's jurisdictional separations rules are codified in 47 CFR Part 36. The revised Part 36 rules were adopted in order to conform the jurisdictional separations process with the new USOA. *See* MTS and WATS Market Structure - Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, 2 FCC Rcd 2639 (1987) (*Part 36 Conformance Order).*

[7] *See Part 36 Conformance Order*, 2 FCC Rcd at 2642.

[8] *See* Amortization of Depreciation Reserve Imbalance of Local Exchange Carriers, 3 FCC Rcd 984 (1988). This order affected only LECs for which the Commission prescribes depreciation rates. For the most part, the Commission prescribes rates for carriers serving very large study areas. There are, however, depreciation rate prescriptions for several carriers with smaller study areas.

[9] *See* Public Notice, NECA *et al.* File Joint Petition for Waiver of Part 36 Rules Regarding the Universal Service Fund, 4 FCC Rcd 6938 (1989), *Erratum*, 4 FCC Rcd 7554 (1989). Comments were filed on October 16, 1989, and reply comments on October 31, 1989. We hereby grant Bell Atlantic's Motion to Accept Late Filed Pleadings, filed October 18, 1989.

[10] Comments were filed by Bell Atlantic Telephone Companies; Cathey, Hutton & Associates, Inc. (CHA); Contel Corporation; Fred Williamson & Associ ates, Inc. (FWA); GVNW, Inc./Management; MCI Telecommunications Corporation; Public Service Telephone Company (PSTC); Rochester Telephone Corporation; Southwestern Bell Telephone Company (SW Bell);

Tallon Cheeseman and Associates, Inc. (TCA); and Telephone and Data Systems, Inc. (TDS). Reply comments were jointly filed by the petitioners.

[11] *See e.g.,* Contel Comments at 2.

[12] *Id.* at 3.

[13] *See, e.g.,* FWA Comments at 1.

[14] Clearly, we may not order herein the addition of End User Service Order Processing costs to the calculation of average cost per loop for calculating the level of USF, as TCA suggests. If TCA desires this procedure, it should file a Petition for Rule Making that fully supports the inclusion of these costs in the USF calculation.

[15] This report contains 1988 end-of-year data and was submitted to the Commission on September 1, 1989. *See* note 3, *supra.* These data were available to the petitioners in August 1989 when they prepared and submitted their petition.

[16] NECA corrected errors contained in its 1989 report and submitted a revised report to the Commission (Revised 1989 NECA USF Report). *See* letter from Thomas E. Quaintance, of NECA, dated November 17, 1989, to the Secretary of the Commission. The report attached to Mr. Quaintance's letter shows the 1989 USF to be $266 million and the forecasted 1990 USF to be $339 million.

[17] The rules provide that qualifying study areas receive 4/8 of the end-of-transition assistance amount in 1989 and 5/8 of that amount in 1990. Hence, all other things being equal, these study areas would have expected to receive a 25 percent increase in USF funding as the transition period moves from the fourth step to the fifth step.

[18] We used the Task Force Report to identify the 1987 and 1988 average cost per loop on a study area basis. We used the Revised 1989 NECA USF Report to identify the 1989 and 1990 cost support payments on a study area basis. In both of these reports, the study areas served by companies with annual revenues less than $40 million are referred to as Subset 3 study areas.

[19] We judged the severity by how much the support payment is expected to decrease per working loop.

[20] We are concentrating on 1987 and 1988 data because the payments of the USF in 1989 are based on 1987 data and the 1990 USF payments are based on 1988 data.

[21] With regard to the new treatment of Revenue Accounting Expenses, the Task Force Report states that this change reduced the average loop cost of small companies (identified as Subset 3 firms) by approximately $5 more than it reduced the nationwide average. *See* Task Force Report at 3. With regard to the new treatment of depreciation expense by large carriers, our independent analysis of this change indicates that it resulted in an increase of the nationwide average cost per working loop of approximately $3. Factors resulting in relative cost changes of only $5 and $3 for the smaller companies do little to explain relative cost reductions that average $138 for this group of ten study areas. Specifically, the average cost reduction for this group is about $140 and that for the industry is about $2.

[22] We note that the petitioners do not allege that the Commission's Part 32 and 36 Rule Makings changed network related costs.

[23] TCA Comments at 3.

[24] MTS and WATS Market Structure, Third Report and Order, 93 FCC 2d 241, 332-333 (1983).

[25] *See* para. 11, *supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C.F. COMMUNICATIONS CORP.,
Complainant,

v.

CENTRAL STATE TELEPHONE COMPANY,	File No. E-89-173
FENNIMORE TELEPHONE COMPANY,	File No. E-89-174
MOSEL & CENTERVILLE TELEPHONE COMPANY,	File No. E-89-175
MT. VERNON TELEPHONE COMPANY,	File No. E-89-176
STOCKBRIDGE & SHERWOOD TELEPHONE COMPANY,	File No. E-89-177
WAUNAKEE TELEPHONE COMPANY,	File No. E-89-178

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 1990; Released: January 10, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 11, 1989, C.F. Communications Corp. ("C.F.") filed a complaint against thirteen defendants, including Central State Telephone Company, Fennimore Telephone Company, Mosel & Centerville Telephone Company, Mt. Vernon Telephone Company, Stockbridge & Sherwood Telephone Company, and Waunakee Telephone Company alleging that they imposed unlawful charges on complainant, in that their tariffs do not authorize them to impose end user common line ("EUCL") charges on the access lines they furnish for complainant's customer-owned pay telephones.

2. On November 13, 1989, the defendants in the above-captioned complaints filed a motion to dismiss and a stipulation to settle and dismiss the above-captioned complaint executed by these defendants and complainant. That stipulation states, *inter alia*, that "[a]s for the Complaint specifically between the . . . Complainant and Defendants they hereby agreed to be bound by the FCC's final decisions concerning the issues raised in the Complaint as those decisions may be eventually rendered against Century Telephone of Wisconsin, Inc., GTE North Incorporated, Wisconsin Bell, Inc., Mosinee Telephone Company, North-West Telephone Company, Turtle Lake Telephone Company, and Utelco, Inc."[1]

3. Based on the statements in the motion to dismiss, we find that there are no longer any issues in controversy and that these proceedings should be terminated.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the motion to dismiss IS GRANTED.

5. IT IS FURTHER ORDERED that this complaint IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] Stipulation at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ACCESS LONG DISTANCE CORPORATION,
Complainant,

v. File No. E-89-423

CENTRAL TELEPHONE COMPANY OF NEVADA,
Defendant.

ORDER

Adopted: January 4, 1990; Released: January 10, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1989, Access Long Distance Corporation ("Access") filed the above-captioned formal complaint against Central Telephone Company (the "Defendant") seeking reimbursement and "other appropriate relief" for interstate access charges levied by the Defendant against Access during the period from October 1, 1985 through December 31, 1986. In accordance with Commission rules governing formal complaint proceedings, Defendant's answer to the complaint was due on November 27, 1989. An Answer and Motion to Dismiss were duly filed. On December 11, 1989, however, Access filed a motion for leave to withdraw its complaint, stating that discussions with Defendant's counsel subsequent to the filing of the complaint established that Access did not receive special access services from the Defendant during the October 1, 1985 through December 31, 1986 time period.

2. On the basis of the statements contained in the Motion, we conclude that there are no longer issues in controversy for the time period covered by the complaint and that this proceeding should be terminated.

3. According, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Access' Motion for Leave to Withdraw Complaint IS GRANTED, and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Assignment of Orbital Locations
to Space Stations in the Domestic
Fixed-Satellite Service

In the Matter of
the Applications of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY	File Nos. 6028-DSS-P/LA-87 6029-DSS-P/LA-87
CONTEL ASC	File Nos. 6025-DSS-P/LA-87 6026-DSS-P/LA-87
GE AMERICAN COMMUNICATIONS, INC.	File No. 6012-DSS-P/LA-87 2965-DSS-ML-88
GTE SPACENET CORPORATION	File No. 2760-DSS-MP/ML-87 6018-DSS-P/LA-87 6019-DSS-P/LA-87 6020-DSS-P/LA-87
HUGHES COMMUNICATIONS GALAXY, INC.	File Nos. 6016-DSS-P/LA-87 6017-DSS-P/LA-87
NATIONAL EXCHANGE SATELLITE, INC.	File No. 6022-DSS-P/LA-87 6023-DSS-P/LA-87

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1989; Released: January 11, 1990

By the Commission:

I. INTRODUCTION

1. In November 1988, the Commission acted on the fifth group of applications for domestic fixed-satellites.[1] It authorized the construction of thirteen additional domestic fixed-satellites, the launch of nine, and the construction and launch of ten replacement satellites.[2] In addition, the Commission assigned an orbital location to each satellite authorized to be launched and made certain adjustments to the orbital assignments of several satellites previously authorized. [3] It also denied a request filed by the American Mobile Satellite Consortium (AMSC)[4] to reserve orbital locations in the 12/14 GHz fixed-satellite band for feeder links for its proposed mobile satellite service (MSS) system.

2. In adopting the 1988 Assignment Plan, the Commission noted that operators could propose alternatives to the plan. The *Assignment Order* stated that we would entertain requests for changes in assignments provided that the changes are consistent with the basic structure of the assignment plan and are agreed to by all, or at least most, of the satellite operators affected by the change. The *Order* also said that satellite licensees could apply for reassignment to any locations that remained unassigned. However, the Commission stated that National Exchange Satellite, Inc. (NEXSAT), as a new entrant that was not assigned to any orbital locations capable of providing 50-state coverage, would be given priority when assigning any of the unassigned 50-state coverage locations.[5]

3. The Commission received several requests for changes in orbital assignments. Alascom, Inc. (Alascom), GE American Communications, Inc. (GE Americom), GTE Spacenet Corporation (GTE Spacenet), Hughes Communications Galaxy, Inc. (Hughes), and NEXSAT all requested adjustments to the locations assigned to one or more of their satellites.[6] Contel ASC, the American Telephone and Telegraph Company (AT&T), Eastern Microwave, Electronic Data Systems Corporation (EDS), GTE Spacenet, Hughes, National Cable Satellite Corporation d/b/a C-SPAN (C-SPAN), NEXSAT, Satellite Network Systems (SNS), Satellite Transponder Leasing Corporation (STLC), Viacom International, Inc. (Viacom), Wal-Mart Stores, Inc. (Wal-Mart), and The Weather Channel filed responses to the various proposals for reassignment. In addition, several operators and users raised concerns about potential interference into their operations from satellites assigned to adjacent locations in the 1988 Assignment Plan.[7]

4. In addition, AMSC filed a petition for reconsideration of the *1988 Assignment Order*.[8] AMSC requests that we reconsider the decision to exclude the MSS licensee from orbital locations at 12/14 GHz. It also requests reconsideration of each of the individual authorizations granted for 12/14 GHz satellites because they involve the 12/14 GHz band. AT&T, Contel ASC, Geostar Messaging Corporation (Geostar), GTE Spacenet, and Hughes opposed AMSC's petition.

5. For the reasons set forth below, we make certain adjustments to the 1988 Assignment Plan. We also grant in part and deny in part AMSC's request for reconsideration of the *1988 Assignment Order*.

II. DISCUSSION

A. NEXSAT Reassignments

1. *Background*

6. NEXSAT is a new entrant in the domestic-fixed satellite industry and, as part of the 1988 processing group, was authorized to construct and launch two hybrid satellites operating in both the 4/6 GHz and 12/14 GHz frequency bands.[9] In the *1988 Assignment Order*, the Commission assigned NEXSAT's satellites to locations in the high power density portions of the orbital arc -- specifically, Spotnet 1 to 76^0 W.L. and Spotnet 2 to 135^0 W.L.[10] The Commission recognized that these locations were not

in that portion of the orbital arc from which 12/14 GHz operators could serve the entire 50-states, although its general policy, when possible, is to assign a new entrant in each frequency band at least one location in that band from which it can provide 50-state coverage. However, given the proposed power density levels on the 12/14 GHz portion of the Spotnet satellites, the Commission concluded that it could not assign the Spotnet satellites to locations outside the 12/14 GHz high power density arc from which they could provide 50-state coverage.[11] The Commission noted, however, that two hybrid locations capable of providing 50-state coverage remained available at 93^0 W.L. and 127^0 W.L. after action on the 1988 group. The *Order* stated that if NEXSAT could successfully coordinate its operations with licensees of adjacent satellites, the Commission would entertain a reassignment request by NEXSAT for one of these locations and would give NEXSAT priority when assigning any of the available 50-state coverage locations.[12]

2. ***Pleadings***

7. NEXSAT subsequently filed a request for reassignment to 93^0 W.L. and 127^0 W.L., stating that it had initiated the coordination process with 12/14 GHz operators adjacent to those locations. GTE Spacenet also filed a request for reassignment of its hybrid Spacenet 2-R satellite from 69^0 W.L. to 93^0 W.L.[13] No other operator filed a competing claim for reassignment to 127^0 W.L.[14] In addition, several parties raised concerns about potential interference from the Spotnet satellites at both 93^0 W.L. and 127^0 into their 12/14 GHz satellites at adjacent locations.[15]

8. In June 1989, NEXSAT filed a supplement to its request. In the supplement, it states that it has devised a plan that will enable it to protect adjacent 12/14 GHz satellites against interference while preserving the design of its Spotnet system. Specifically, NEXSAT states that it plans to: (1) assign carrier frequencies and polarizations in such a manner that NEXSAT's carriers do not overlap with the more sensitive very small aperture terminal (VSAT) carriers on adjacent satellites; (2) employ binary phase shift keying (BPSK) modulation rather than quaternary phase shift keying (QPSK); (3) employ R1/2 coding rather than R3/4 FEC if QPSK modulation is retained; (4) employ the newest generation of earth stations; and/or (5) employ larger earth stations. NEXSAT further states that to the extent that these methods do not eliminate interference, it will use other techniques to reduce its relevant power density to whatever level the Commission considers acceptable under its routine licensing standards.

9. Only one of the adjacent operators -- Contel ASC -- has significant coordination concerns remaining in view of NEXSAT's supplement. STLC/Salomon Brothers state that NEXSAT's plan appears to provide "a reasonable basis for the development of a workable coordination agreement between STLC and NEXSAT with regard to [STLC's] SBS-4 satellite," which is currently operating at 91^0 W.L.[16] They state, however, that we should not assign a Spotnet satellite to 93^0 W.L. without requiring NEXSAT to undertake certain coordination measures with respect to both SBS-4 and its replacement.[17] Hughes, who leases transponders on SBS-4 and who has filed an application to assume control of STLC,[18] agrees that NEXSAT's plan forms a reasonable basis for coordination. It states that to the extent NEXSAT's proposed techniques do not resolve all interference concerns, NEXSAT should be required to employ additional coordination measures to all other non-high power density satellites -- including those launched after the Spotnet satellites are launched.[19] GTE Spacenet, whose GSTAR 4 satellite is assigned to 125^0 W.L., states that coordination efforts between NEXSAT and GTE Spacenet should be successful if NEXSAT agrees to certain measures.[20] However, Contel ASC, whose ASC-2 satellite is assigned to 129^0 W.L., states that it is not convinced that NEXSAT's plan will resolve all interference problems. Contel ASC notes that it is particularly concerned that NEXSAT will cross-strap (12/14 GHz band to 4/6 GHz band) television uplinks.[21]

3. ***Discussion***

10. We conclude that NEXSAT's Spotnet satellites should be able to be successfully coordinated with satellites adjacent to 93^0 W.L. and 127^0 W.L. We agree with GTE Spacenet, Hughes and STLC that the techniques described in NEXSAT's supplement form a solid framework for coordination, and we expect that good faith efforts on behalf of all parties will lead to successful coordination agreements. The only specific concern that was raised, by Contel ASC, did not involve NEXSAT's proposed use of higher powers but involved the possibility that NEXSAT will cross-strap television uplinks. However, NEXSAT states that as presently designed, the NEXSAT satellites would not even be capable of cross-strapping.[22] Moreover, we do not expect that cross-strapping would pose serious coordination problems even if it is used. Other domestic satellite operators are planning to use this technique and these licensees should still have sufficient operational flexibility to accommodate adjacent operators.[23]

11. Nonetheless, we recognize that NEXSAT will be operating satellites with power densities above those that we routinely authorize at orbital locations outside the 12/14 GHz high power density arc.[24] Thus, in order to operate at higher power densities, NEXSAT must bear the burden of obtaining operational agreements with adjacent licensees who are operating satellites with routinely authorized power density levels. This applies both to adjacent satellites that are currently operating or authorized, and to those that are licensed in the future, provided that their power density levels remain at the lower levels. Given this, we will not condition a reassignment to NEXSAT on its using specified coordination measures. Rather, we will allow NEXSAT the flexibility to use whatever techniques it devises to eliminate the problem, with the methods described in its supplement as the starting point. If NEXSAT cannot obtain an agreement, however, it will be required to reduce its power density levels to those that are routinely authorized. This can be done simply by limiting the power of earth station antennas transmitting to the satellite. If this is done, NEXSAT should not be more likely to cause interference than any other low power operator. Accordingly, any interference problems between NEXSAT's lower-power operations and the operations of adjacent satellites would be mutually resolved by the affected licensees.

12. Further, we grant NEXSAT's request for reassignment to both 127^0 and 93^0 W.L. There are no competing claims for 127^0 W.L. Although GTE Spacenet also seeks reassignment to 93^0 W.L., we believe that the public interest would be best served by granting NEXSAT a second 50-state coverage location. GTE Spacenet is currently assigned to five 12/14 GHz and two 4/6 GHz orbital

locations from which 50-state coverage is possible[25] and has not presented any evidence justifying any additional 50-state coverage locations.[26] Assigning NEXSAT a second 50-state coverage location would provide all its customers with in-orbit protection in the event that one of its satellites fail. We therefore grant NEXSAT's request for both 127^0 W.L. and 93^0 W.L.[27] The 135^0 W.L. and 76^0 W.L. orbital locations previously assigned to NEXSAT are now available for reassignment.

B. Other Reassignments in the Western Arc

1. *GE Americom / Alascom*

13. GE Americom and Alascom request us to allow their Satcom C-1 and Aurora 2 4/6 GHz band satellites to exchange their assigned locations. Satcom C-1 is currently assigned to 139^0 W.L.; Aurora 2 is currently assigned to 137^0 W.L. The parties assert that this exchange will enable them to implement an arrangement by which GE Americom will own transponders on Aurora 2. GE Americom also states that if we approve this request, it will change Satcom C- 1's polarization sense from vertical to horizontal to conform with the Commission's assignment plan in the 4/6 GHz band.

14. We grant GE Americom/Alascom's unopposed request with the condition that Aurora 2 will be required to operate with vertical polarization and Satcom C-1 with horizontal. With these changes, grant is fully consistent with the basic structure of the assignment plan.

2. *GE Americom*

15. GE Americom also requests that we reassign its 4/6 GHz Satcom C-4 satellite, which is scheduled to be launched in September 1992,[28] from 81^0 W.L. to 135^0 W.L.[29] GE Americom states that it has firm customer requirements for two satellites with 50-state coverage, and that Satcom C-4 at 135^0 W.L., together with Satcom C-3 at its assigned 131^0 W.L. location, will allow it to meet these needs.[30] It also asserts that the reassignment will give Satcom C-4 access to its in-orbit protection satellite, Satcom C-1.[31]

16. Hughes objects to the reassignment of Satcom C-4 to 135^0 W.L. because it would disrupt customers on its 4/6 GHz Galaxy 1 satellite.[32] Galaxy 1 is currently operating at 134^0 W.L., its original assignment, although it was reassigned to 133^0 W.L. in the *1988 Assignment Order*.[33] Hughes wishes to continue to operate Galaxy 1 from 134^0 W.L. until its replacement, Galaxy 1-R, is launched into 133^0 W.L. in March 1993. Hughes claims that grant of GE Americom's request to launch Satcom C-4 into 135^0 W.L. may require it to relocate Galaxy 1 before Galaxy 1-R is launched. Hughes requests that if we nevertheless assign Satcom C-4 to 135^0 W.L., we should require its launch date to be coordinated with Galaxy 1-R's.

17. We grant GE Americom's request. When the Commission adopted its policy to reduce orbital spacings between satellites to 2^0 in 1983, it recognized that this might require certain in-orbit satellites to change locations.[34] However, it concluded that the increased number of satellites that could be accommodated in-orbit with reduced spacings, and the overall increase in availability of satellite-delivered services to the public, outweighed the costs and service disruptions involved in moving a few in-orbit satellites. The Commission has also emphasized that licensees may continue to operate at the locations specified in previous assignment orders until it is necessary to move the satellite to its newly assigned location to accommodate another satellite.[35] In developing assignment plans since 1983, the Commission has attempted to minimize the number of in-orbit satellite relocations required.[36]

18. We recognize that reassigning Satcom C-4 to 135^0 W.L. will in all likelihood require Hughes to move Galaxy 1. While we seek to avoid in-orbit relocations whenever possible, we conclude that the public interest would be best served by allowing Satcom C-4 to be launched into 135^0 W.L. in September 1992. This will allow GE Americom to provide 50-state coverage and to provide its customers with in-orbit protection capability over the 10-year lifetime of Satcom C-4. Hughes is currently operating at a location that is not its assigned location and that is not in conformance with our two degree spacing plan. In fact, Hughes has been on notice since 1985, when Galaxy 1's assignment was first changed, that it would be required to transition its operations to a new orbital location whenever the satellite assigned to 135^0 W.L. was launched. As GE Americom points out, several licensees have been or will be required to move in-orbit satellites to accommodate new ones being launched.[37] We believe that, on balance, the interests of GE Americom in launching a satellite as scheduled into a location consistent with our two degree spacing plan outweigh the interests of Hughes in continuing to operate from a location that is not its assigned location. This would, in essence, treat Hughes more favorably than other operators who have had to or will be required to move in-orbit satellites to implement two degree spacing. Accordingly, we grant GE Americom's request and reassign Satcom C-4 from 81^0 W.L. to 135^0 W.L. Further, we will not require GE Americom to delay launch of Satcom C-4 to accommodate Hughes's projected launch date for Galaxy 1-R, although Hughes is free to advance its launch date.

3. *Hughes*

19. Hughes requests that we reassign its 12/14 GHz Galaxy B-R[38] satellite from 131^0 W.L to 133^0 W.L., which is unassigned. Hughes's 4/6 GHz band satellite, Galaxy 1, and its replacement, Galaxy 1-R, are currently assigned to 133^0 W.L. Hughes asserts that reassigning Galaxy B-R to 133^0 W.L. would permit it to co-locate its 4/6 GHz and 12/14 GHz satellites or to consider the possibility of constructing and launching a hybrid satellite.

20. We deny Hughes's request. The 12/14 GHz portion of the 133^0 W.L. orbital location is in that portion of the arc reserved for high power density satellites.[39] Hughes's Galaxy B-R satellite is to operate with a maximum spacecraft transmitter power of 60 watts with and effective maximum equivalent isotropically radiated power (EIRP) of 53.3 dBW. This is comparable to most other authorized satellites. We will not assign a lower power density satellite to a location in the high power arc at this time. Such an assignment would erode the Commission's decision to accommodate high power density state-of-the-art satellites that cannot be readily coordinated with other satellites by reserving for them orbital locations in a discrete portion of the arc.

21. Moreover, Hughes has not decided that it wants to construct and launch a hybrid satellite that it would operate from 133^0 W.L. If Hughes builds two single band 4/6 GHz and 12/14 GHz satellites as it applied for and is authorized to do, there is little advantage in co-locating them at one orbital location. Should Hughes desire to

modify its business plan and request authority to construct and launch a hybrid satellite rather than two single-band satellites, it may do so. At that time, we will solicit comment on and further study the merits of continuing to reserve locations in the high power density arc.

C. Other Reassignments in the Eastern Arc

1. *GE Americom*

22. Aside from the NEXSAT/GTE Spacenet requests for 93^0 W.L., other operators request new assignments in the eastern portion of the arc. GE Americom notes that its 12/14 GHz band Satcom K-3 satellite, which was assigned to 85^0 W.L. but had not been launched, was recently sold to a European entity.[40] It further notes that Satcom K-1, which is identical to Satcom K-3, is currently operating from 85^0 W.L., although it was scheduled to be moved to its assigned 67^0 W.L. location when Satcom K-3 was launched. In light of the Satcom K-3 sale, GE Americom requests that we permit Satcom K-1 to remain at 85^0 W.L. GE Americom also requests that we assign Satcom C-2 to 85^0 W.L.[41]

23. Because Satcom K-1 and K-3 are technically identical, GE Americom is free to substitute Satcom K-1 for Satcom K-3 at 85^0 W.L. We allow licensees the flexibility to place identical authorized satellites into whichever of their assigned locations best suits their system needs at the time.[42] Thus, GE Americom could have launched either Satcom K-1 or K-3 into either of its assigned locations.[43] Satcom K-1 may therefore remain at 85^0 W.L. until the end of its license term. Because GE Americom relinquished its authorization for Satcom K-3, we consider the 12/14 GHz band assignment at 67^0 W.L. available for reassignment to another domestic fixed-satellite licensee.

24. We find, however, that GE Americom's request for assignment of Satcom C-2 to 85^0 W.L. is premature. GE Americom states that Satcom C-2 is intended to replace Satcom 2-R, which was launched in 1983 and is currently operating at 72^0 W.L. As Hughes points out, however, GE Americom has not yet filed an application to construct and launch this satellite.[44] Thus, there is no satellite to consider reassigning.

25. GE Americom argues, however, that there is no reason why we should not take into account the need for continuity of service to Satcom 2-R's customers and provide for its eventual replacement at this time. We agree that satellite operators should have some assurance they will be able to continue serving their customers. As the Commission has stated previously, we will generally authorize replacement satellites at the same location as the older satellite provided that that location remains available for assignment to a U.S. satellite and no other technical problems are involved.[45] Thus, absent other overriding factors, we will likely authorize a replacement for Satcom 2-R at 72^0 W.L. However, we find it premature to consider a request by GE Americom to assign a satellite that is not yet authorized, or indeed applied for, to a new orbital location. To do otherwise would violate our policy not to hold orbital locations for satellites to be launched more than five years in the future.[46] It would also violate established domestic fixed-satellite processing procedures, where we concurrently consider concrete proposals filed within discrete processing groups so as to allocate the limited orbit-spectrum resource equitably and efficiently.[47] We therefore dismiss without prejudice GE Americom's application to assign Satcom C-2 to 85^0 W.L.

2. *Hughes*

26. Finally, Hughes requests that we reassign Galaxy 5-E[48] from 64^0 W.L. to either 85^0 W.L. or 81^0 W.L. Galaxy 5-E is required to be launched by July 1993.[49] As noted, the 4/6 GHz location at 85^0 W.L. will become available for reassignment when AT&T's replacement satellite for Telstar 302 becomes operational in early 1994. In addition, we have in this order reassigned Satcom C-4, which is scheduled to be launched in September 1992, from 81^0 W.L. to 135^0 W.L.[50] No comments were received relating to Hughes's request for reassignment to 85^0 W.L. GE Americom opposes Hughes's request for reassignment to 81^0 W.L., arguing that it should not be required to forfeit 81^0 W.L. simply because it has moved Satcom C-4. It further states that it should not be penalized by losing an orbital location because it did not file an application for a replacement satellite for Satcom 2-R in the last processing group.

27. We grant Hughes's request for reassignment to 81^0 W.L. The 4/6 GHz orbital location at 85^0 W.L. is not available for reassignment at this time. AT&T's Telstar 302 satellite is permitted to operate at 85^0 W.L. until the satellite intended to replace it -- Telstar 402 -- is launched and operational.[51] Telstar 402 is not required to be launched until December 1993, and will not be operational until January or February 1994, at the earliest. Given this time frame, and the fact that satellites authorized in the 1988 processing group should be launched within five years of grant -- that is, by the end of 1993 -- the Commission did not reassign another satellite to 85^0 W.L. in the *1988 Assignment Order*. Rather, it stated that 85^0 W.L. "will be available for reassignment to a qualified applicant in the *next* domestic fixed-satellite processing group."[52] Hughes is required to launch Galaxy 5-E by July 1993. We will not permit licensees in prior groups to delay launch of their satellites simply to obtain a preferred orbital location. Doing so would contravene established domestic fixed-satellite processing policies. First, it would violate our policy to deny extensions of the required launch date for a satellite unless the delay is due to circumstances beyond the licensee's control.[53] Second, it would violate our policy not to consider applications for satellites to be launched more than five years after grant.[54] Thus, we deny Hughes's request for reassignment of Galaxy 5-E to 85^0 W.L.

28. However, we grant Hughes's request for reassignment to 81^0 W.L. with certain conditions. GE Americom applied for, and has been granted, authority to locate the replacement satellite for Satcom 4 at 135^0 W.L. rather than at 81^0 W.L. where Satcom 4 is currently operating. This constitutes a reassignment. The Commission has not allowed licensees to continue to hold their original orbital locations after they have been granted a reassignment.[55] To do so would, in essence, grant that licensee an additional orbital location outside of an established processing group in contravention of our domestic fixed-satellite processing procedures.[56] Therefore, we disagree with GE Americom that it should not lose 81^0 W.L. simply because it has requested a new location for Satcom C-4.[57]

29. Further, we do not believe that the fact that GE Americom has not applied for a replacement satellite for Satcom 2-R mandates a different result. We do not allow licensees to hold locations for satellites that they may apply for in the future. If GE Americom wishes to replace Satcom 2-R, it is likely that, absent other factors, it

will be able to do so at the location at which Satcom 2-R is now operating, that is, at 72° W.L.[58] If GE Americom wishes another location for that satellite, it may apply for reassignment to an available location concurrently with its application to construct and launch the satellite. We will not allow GE Americom to hold 81° W.L. for a satellite that is not yet authorized and for which no application has been submitted.

30. GE Americom is scheduled to replace Satcom 4 in September 1992;[59] Hughes is scheduled to launch Galaxy 5-E in July 1993. Thus, no scheduling problems appear likely. We therefore grant Hughes's request for reassignment of Galaxy 5-E from 64° W.L. to 81° W.L. We also require Hughes to change Galaxy 5-E's polarization sense from horizontal to vertical to conform with our assignment plan at 4/6 GHz. In view of this reassignment, the 64° W.L. location previously assigned to Galaxy 5-E is now available for assignment to another 4/6 GHz satellite.

D. Other Technical Concerns

31. Several satellite licensees and users also raise concerns about potential interference from satellites that will be adjacent to their satellites under the 1988 Assignment Plan. For example, several parties state that unacceptable interference may be caused by Telstar 402 into SBS-4,[60] by Telstar 402 into Galaxy 3,[61] by GSTAR 1/1-R into SBS-5,[62] by Telstar 302 into ASC-2,[63] and by Spacenet 1-R into Contelsat 1.[64] Hughes also states that if Satcom C-4 is reassigned to 135° W.L., interference into Hughes's operations at 133° W.L. is possible. The operators of the "interfering" satellites believe that coordination can be accomplished informally.[65]

32. We expect domestic satellite operators to resolve potential interference problems because they can best weigh the technical and economic tradeoffs involved in negotiating a coordination agreement. We do not become involved unless the parties are unable to reach an agreement.[66] We have not been presented with any potential problems here that appear insurmountable or that otherwise require our involvement at this time. We believe that in all the cases raised, coordination should be able to be accomplished through the cooperative efforts of the operators. If a coordination agreement cannot be reached after exhaustive good faith effort, the parties may then request that we intervene.

E. AMSC Petition

1. *Background*

33. AMSC requests that we reconsider our decision not to assign any 12/14 GHz orbital locations to AMSC for feeder link operations for its proposed MSS system. AMSC had requested that the Commission reserve three 12/14 GHz locations for MSS satellites, each of which will require 100 MHz of uplink spectrum and 100 MHz of downlink spectrum for their feeder links.[67] AMSC recognized that there is 500 MHz of bandwidth available for use at these locations, and alternatively suggested that in order to ensure full spectrum use, the Commission could require an MSS satellite and a domestic fixed-satellite to co-locate at each 12/14 GHz orbital location and together make use of the 500 MHz of bandwidth.[68]

34. In the *1988 Assignment Order*, the Commission denied AMSC's request for several reasons.[69] First, the *Order* stated that AMSC's proposal to locate its feeder links at 12/14 GHz violated Commission instructions to the MSS consortium in the *MSS Licensing Proceeding* to propose frequencies for its feeder links in fixed-satellite frequency bands other than those used by domestic fixed-satellites.[70] Second, the *Order* stated that allowing AMSC to occupy a location where it intends to use only 100 MHz of spectrum would violate the Commission's technical standards, which require all fixed-satellite operators to use the entire 500 MHz of available spectrum. The Commission further stated that it would not disadvantage certain domestic fixed-satellite operators by requiring them to co-locate their satellites with an MSS satellite and, in essence, preclude them from operating on a significant portion of their allocated spectrum. The Commission suggested several alternative frequency bands for MSS feeder links and stated that it would not be adverse to a voluntary agreement between AMSC and a domestic satellite operator to co-locate their satellites.

2. *Pleadings*

35. AMSC requests that we reconsider this decision. It states that the 12/14 GHz band is uniquely suited for MSS and is the best alternative for feeder link operation. It contends that this band would provide the lowest costs, fewest coordination difficulties, and fewest technical difficulties. It also states that its proposal to co-locate an MSS satellite with a domestic fixed-satellite would maximize spectrum efficiency. AMSC contends that the 12/14 GHz band is not currently crowded nor is it likely to become so in the future, and that most 12/14 GHz domestic fixed-satellites do not use the entire 500 MHz of spectrum in any event because they are "power limited."[71] AMSC also points to an agreement it had reached with NEXSAT regarding co-location of NEXSAT's satellites with AMSC's as evidence that fixed-satellite operators are willing to share spectrum with AMSC. AMSC concludes that "if the public interest would be served by AMSC acquiring capacity from a [domestic fixed-satellite operator], it would benefit equally by the outright assignment of that spectrum to AMSC."[72]

36. Several domestic fixed-satellite operators oppose AMSC's petition.[73] These operators argue that assigning AMSC 12/14 GHz locations would violate the Commission's standards for efficient spectrum use. They also argue that AMSC's claims that domestic fixed-satellites do not need the full 500 MHz at 12/14 GHz and that the 12/14 GHz band will be underutilized are misplaced.[74] Contel ASC further opposes AMSC's reconsideration request on the grounds that it would involve a reallocation of spectrum without a public interest finding and Rule Making procedure, would result in higher priced 12/14 GHz band service because supply would be made smaller, and would run counter to the Commission's goals of preserving flexibility in assigning orbital locations. GTE Spacenet states that if the Commission accommodates AMSC's request, it should make the allocation for feeder links on a secondary basis, placing the burden of coordination on AMSC.

37. Geostar, who has applied to provide a digital land mobile satellite service in the L-band maritime frequency bands, states that AMSC has failed to substantiate its claim that there are no other alternative frequency bands for feeder links.[75] It further states that granting AMSC's re-

quest will restrict the Commission's ability to continue to accommodate new domestic satellite applicants and to consider all orbital locations fungible. Geostar also states that if we permit AMSC to operate its feeder links at 12/14 GHz, basic fairness requires that all other applicants be permitted to use this band for feeder links as well. Geostar concludes that the Commission therefore cannot grant AMSC's petition without a Rule Making to establish a general policy on use of the fixed-satellite bands.[76]

3. ***Discussion***

38. We affirm the Commission's decision not to assign AMSC a 12/14 GHz location in the central MSS *Authorization Order* and conclude that the public interest would be best served by assigning AMSC to locations at the far eastern and far western portions of the arc, and by permitting AMSC to operate its feeder links on these satellites in the 11.7-11.8 GHz and 14.0-14.1 GHz frequency bands.[77]

a. ***Central Satellite***

39. AMSC has not persuaded us we should disturb the findings in the *1988 Assignment Order* denying AMSC a central 12/14 GHz location. While the 12/14 GHz band may be AMSC's preference, we will not allow it to occupy a prime fixed-satellite location in order to use 100 MHz for MSS operations. Several domestic fixed-satellite applicants in the 1988 processing group requested the 101^0 W.L. location sought by AMSC because it was one of the few unassigned locations capable of providing 50-state coverage.[78] We will not prevent a domestic satellite licensee from operating at full capacity from this location, especially when other alternatives are available to AMSC.

40. First, contrary to AMSC's claims, that portion of the 12/14 GHz orbital arc from which 50-state coverage can be provided is "crowded," as evidenced by the competing claims for these assignments, and is likely to remain so as satellites are launched and later replaced. Second, we disagree with AMSC's assertion that 12/14 GHz satellite operators do not require the entire 500 MHz of available spectrum. We agree with AT&T and GTE Spacenet that state-of-the art 12/14 GHz satellites are not necessarily power limited and can therefore use the entire available spectrum. We also agree that any reduction in available bandwidth would reduce the capacity of domestic fixed-satellites. Given these considerations, we would consider assigning AMSC to 101^0 W.L. by itself or together with a co-located domestic fixed-satellite only if no other alternatives were available to AMSC.

41. Other alternatives are, however, available. We continue to believe that the suggestions offered to AMSC in the *1988 Assignment Order* are feasible.[79] Moreover, in response to a Bureau request, AMSC amended its MSS application to request, alternatively to its request for reconsideration here, that we authorize its satellite at 101^0 W.L. to operate its feeder links over the 10.70-10.95 GHz and 13.0-13.15/13.2-13.25 GHz frequency bands. The Commission granted this request in the *MSS Authorization Order*. [80] Thus, we see no reason to compromise the legitimate needs of domestic fixed-satellite operators by permitting AMSC to operate its feeder links at 12/14 GHz at 101^0 W.L.

b. ***Eastern and Western Satellites***

42. We will, however, permit AMSC to operate 12/14 GHz feeder links from locations at the edges of the U.S. domestic orbital arc. In the *MSS Authorization Order*, the Commission assigned AMSC's eastern and western satellites to 62^0 W.L. and 139^0 W.L. and authorized AMSC to use the 11.7-11.8 GHz and 14.0-14.1 GHz frequency bands for feeder link operations.[81] We see no reason to change that result here.

43. As discussed in the *MSS Authorization Order*, we believe that the adverse impact on the domestic satellite industry, if any, of allowing AMSC to operate feeder links from "fringe" locations is not sufficient to warrant hindering the introduction of mobile satellite service, with its accompanying benefits, to the public. The domestic fixed-satellite industry is well established, with four groups of authorizations granted since the first licenses were awarded in 1972.[82] With the 1988 authorizations, nine companies are licensed to operate 12/14 GHz band satellites at a total of 23 orbital locations ranging from 64^0 W.L. to 135^0 W.L. A wide variety of fixed-satellite services, including video, data, and voice services, are being provided via the thirteen 12/14 GHz satellites currently in-orbit and operating. We do not believe that assigning two "fringe" locations to AMSC will affect the availability or price of fixed-satellite services or will unduly impede our flexibility to assign or adjust orbital locations and to administer other domestic fixed-satellite policies.

44. Moreover, while domestic satellite operators argue that "limited" 12/14 GHz band fixed-satellite spectrum should not be used in the provision of mobile services, we note that no applicant filing in the last processing group requested 12/14 GHz locations as far east or west as AMSC's proposed locations. We also note that we were able to accommodate the requests of all qualified applicants filing as part of the last domestic fixed-satellite processing group, primarily because 16 of the 20 authorizations granted in the previous group were relinquished. While it may be technically possible for AMSC to operate its feeder links on other frequencies, as the commenters suggest, we will not continue to hold locations at the edges of the domestic arc for fixed-satellites to the detriment of the entity who claims it can successfully use these assignments and whom we have found qualified to provide a new and needed service to the public.[83]

45. In affirming these "fringe" assignments, we have also considered ASMC's initial request for an eastern 12/14 GHz location closer to the central portion of the arc.[84] However, AMSC can successfully operate its MSS system from the locations assigned it in the *MSS Authorization Order*. Given this, we see no reason to assign AMSC a location in the "more crowded" eastern portion of the 12/14 GHz arc or to disadvantage certain domestic fixed-satellite operators in that portion of the arc by requiring them to co-locate with AMSC.[85]

46. Finally, as stated in the *MSS Authorization Order*, we do not believe a Rule Making is necessary before assigning these frequencies to AMSC. Feeder link operations are considered a fixed-satellite service because transmissions are made to and from fixed points; thus, no reallocation is needed.[86] Moreover, we will consider any other requests to use these frequencies for feeder links for mobile satellite systems on an individual basis. At this time, we do not envision that such requests, if any, will be commonplace.

47. Thus, we grant AMSC's petition for reconsideration to the extent that we permit it to use 100 MHz of 12/14 GHz band spectrum for its feeder links at 62^0 W.L. and at 139^0 W.L. and deny AMSC's petitions for reconsideration of each of the individual authorizations for 12/14 GHz satellites. We emphasize, however, that AMSC is required to implement its system in accordance with the schedule described in the *MSS Authorization Order*. [87] If AMSC fails to meet the required implementation milestones for its eastern and western satellites, the authorizations for these satellites will become null and void, and the locations will become available for reassignment to a domestic fixed-satellite operator.

III. CONCLUSION AND ORDERING CLAUSES

48. With this order, we dispose of all requests for changes to the *1988 Assignment Order* and modify the 1988 Assignment Plan accordingly. We also dispose of AMSC's petition for reconsideration of the *1988 Assignment Order* and several individual licensing orders that were concurrently issued.

49. Accordingly, IT IS ORDERED that the Petition for Reconsideration of *Assignment of Orbital Locations to Space Stations in the Domestic Fixed - Satellite Service*, 3 FCC Rcd 6973 (1988), *American Telephone and Telegraph Company*, 3 FCC Rcd 6980 (1988), *Contel ASC*, 3 FCC Rcd 6982 (1988), *GE American Communications, Inc.*, 3 FCC Rcd 6984 (1988), *GTE Spacenet Corporation*, 3 FCC Rcd 6986 (1988), *Hughes Communications Galaxy, Inc.*, 3 FCC Rcd 6989 (1988), and *National Exchange Satellite, Inc.*, 3 FCC Rcd 6992 (1988) filed by the American Mobile Satellite Company, Inc. IS GRANTED IN PART AND DENIED IN PART to the extent set forth in this order.

50. IT IS FURTHER ORDERED that the Request for Alternative Orbital Arrangement filed by Alascom, Inc. and GE American Communications, Inc. IS GRANTED in accordance with the condition contained in paragraph 14 of this order.

51. IT IS FURTHER ORDERED that the Supplemental Request for Change of Orbital Assignment filed by GE American Communications, Inc. IS GRANTED IN PART AND DENIED IN PART.

52. IT IS FURTHER ORDERED that the Request for Orbital Reassignment filed by GTE Spacenet Corporation IS DENIED.

53. IT IS FURTHER ORDERED that the Requests for Change of Orbital Assignment filed by Hughes Communications Galaxy, Inc. ARE GRANTED IN PART in accordance with the condition contained in paragraph 30 of this order and ARE OTHERWISE DENIED.

54. IT IS FURTHER ORDERED that the Request for Assignment of New Orbital Locations filed by National Exchange Satellite, Inc. IS GRANTED in accordance with the conditions contained in paragraph 11 of this order.

55. IT IS FURTHER ORDERED that the assignment plan contained in the Appendix to *Assignment of Orbital Locations to Space Stations in the Domestic Fixed - Satellite Service*, 3 FCC Rcd 6973 (1988) IS MODIFIED as set forth in the Appendix to this order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* Alascom, Inc., 3 FCC Rcd 6978 (1988); American Telephone and Telegraph Company, 3 FCC Rcd 6980 (1988); Contel ASC, 3 FCC Rcd 6982 (1988); GE American Communications, Inc., 3 FCC Rcd 6984 (1988); GTE Spacenet Corporation, 3 FCC Rcd 6986 (1988); Hughes Communications Galaxy, Inc., 3 FCC Rcd 6989 (1988); National Exchange Satellite, Inc., 3 FCC Rcd 6992 (1988).

[2] Subsequently, the Commission granted GE American Communications, Inc. (GE Americom) authority to construct and launch three additional replacement satellites. *See* GE American Communications, Inc., 4 FCC Rcd 6534 (1989). In that order, the Commission also deferred action on GE Americom's separate applications for reassignment of two satellites. GE Americom's requests for reassignment, subsequently modified, are considered here.

[3] Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6972 (1988) (*1988 Assignment Order*).

[4] AMSC has since changed its name to American Mobile Satellite Company.

[5] *1988 Assignment Order*, *supra* note 3, at para. 16.

[6] GE Americom subsequently modified its requested reassignments. *See* Supplemental Request for Change of Orbital Assignment (April 13, 1989) (GE Americom Supplement). NEXSAT also filed a supplement to its initial request, in which it proposed several methods to be used in coordinating its satellites with adjacent satellites. *See* Supplement to Request for Assignment of New Orbital Locations (June 7, 1989).

[7] These were Salomon Brothers, Inc. (Salomon Bros.), STLC, Contel ASC, and EDS.

[8] GE Americom and Home Box Office, Inc. (HBO) also filed petitions for reconsideration, requesting reconsideration to the extent that action on the 1988 processing group reflected the Commission's decision in the Satcom K-3 modification proceeding, in which they also petitioned for reconsideration. In that proceeding, the Commission established discrete portions of the orbital arc for 12/14 GHz high power density satellites, and denied GE Americom's request to modify its Satcom K-3 satellite to use higher power densities in a location outside this arc. GE American Communications, Inc., 3 FCC Rcd 6871 (1988). GE Americom and HBO subsequently withdrew their petitions in both the modification proceeding and in this proceeding. *See* letters from Counsel, GE Americom to Secretary, FCC (March 22, 1989) and from Counsel, HBO to Secretary, FCC (March 23, 1989).

[9] National Exchange Satellite, Inc., *supra* note 1. A hybrid satellite contains a full complement of transponders operating in each frequency band on one space platform.

[10] Orbital locations from 74^0 W.L. to 79^0 W.L. in the eastern portion of the arc and from 133^0 W.L. to 137^0 W.L. in the western arc have been earmarked for 12/14 GHz satellites that are to operate with power densities above those that we routinely authorize.

[11] *See 1988 Assignment Order*, *supra* note 3, at n. 41.

[12] *See 1988 Assignment Order, id.*, at n. 41 and para. 16.

[13] GTE Spacenet states that if, however, 93^0 W.L. is assigned to NEXSAT, it requests reassignment to any other hybrid location between 79^0 W.L. and 103^0 W.L. that may become available before Spacenet 2-R is launched in 1993.

[14] GE Americom recognizes that NEXSAT, as a new entrant, should be given the first opportunity for 127^0 W.L. It therefore requests that we reassign its 4/6 GHz Satcom C-4 satellite from 81^0 W.L. to either 135^0 W.L. or 127^0 W.L. depending on our disposition of NEXSAT's request. GE Americom's request is discussed in paras. 15-18, *infra*.

[15] *See* comments of AT&T, Contel ASC, GTE Spacenet, Hughes, STLC, Wal-Mart, and EDS.

[16] *See* STLC/Salomon Brothers Comments on NEXSAT's Supplement at 3.

[17] STLC/Salomon Brothers request that we condition any assignment on NEXSAT adhering to the coordination methods outlined in its supplement and reducing its carriers to a non-interference level or to a maximum of +6.0 dBW/4KHz, the level currently allowed by the Commission for routine licensing of small 12/14 GHz band earth stations.

[18] *See* Application for Consent to Transfer of Control, File Nos. 1838/1839/ 1840-DSS-TC-89 (filed July 21, 1989).

[19] EDS, a customer on SBS-4, urges us not to assign a satellite to 93^0 W.L. until satellite coordination procedures are established to the satisfaction of SBS-4's operators.

[20] These consist of NEXSAT agreeing to: (1) reduce the equivalent isotropically radiated power (EIRP) of the interfering carrier to a level that equates to a +6.0 dBW/4KHz EIRP density and (2) employ BPSK modulation with 1/2 rate coding into an improved performance earth station with a G/T of 22.5 dB/k or better.

[21] Cross-strapping allows transponders in both bands to interconnect, permitting various combinations of uplinking in one band and downlinking in the other. Cross-strapping decreases the operator's flexibility to rearrange traffic on particular transponders during coordination to accommodate an adjacent operator's traffic pattern because any transponder loading plan it uses in the 4/6 GHz band would have to be identical in the 12/14 GHz band.

[22] *See* NEXSAT Reply to Comments on Supplement (July 31, 1989), at 5-6.

[23] AT&T, for example, is authorized to use cross-strapping in its Telstar 401 and 402 satellites.

[24] We routinely authorize small 12/14 GHz antennas that operate with a maximum satellite carrier EIRP density of not more than +6.0 dBW/4 KHz within the service area and a power spectral density of -14.0 dBW/4 KHz into a 1.2 meter or larger earth station antenna. *See* Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, 51 Fed. Reg. 15067 (1986).

[25] These are 4/6/12/14 GHz hybrid locations at 103^0 W.L. and 87^0 W.L., and single-band 12/14 GHz band locations at 125^0 W.L., 121^0 W.L., and 105^0 W.L.

[26] GTE Spacenet states that reassignment will allow it to meet the needs of its customers desiring service from locations between 81^0 W.L. and 103^0 W.L., which it is unable to meet with capacity on Spacenet 1/1-R and Spacenet 3. No documentation is provided in support of this statement.

[27] With this reassignment, no hybrid orbital locations remain available in the arc from 79^0 W.L. to 103^0 W.L. Thus, we cannot grant GTE Spacenet's request for reassignment of Spacenet 2-R. Further, we will not hold GTE Spacenet's application until Spacenet 2-R is launched, as GTE Spacenet suggests. Should a hybrid location become available in the future, GTE Spacenet may file an application for reassignment at that time.

[28] *See* GE Americom Reply to Comments on Supplemental Request (June 14, 1989), at 7.

[29] GE Americom requested either the 135^0 W.L. or 127^0 W.L. location, depending on which was assigned to NEXSAT.

[30] Because 4/6 GHz satellites can operate with smaller elevation angles than 12/14 GHz satellites, a 4/6 GHz satellite operating at 135^0 W.L. can serve the entire 50 states.

[31] Several of GE Americom's customers filed comments in support of the relocation request. *See* comments of C-SPAN, The Weather Channel, Viacom International, Inc., and Eastern Microwave, Inc.

[32] Hughes also states that if Satcom C-4 is reassigned, its operations may interfere with Hughes's 4/6 GHz band operations at 133^0 W.L. We do not believe, however, that any potential interference problems here are significant or cannot be mutually resolved by the parties. *See* paras. 31-32, *infra*, for a general discussion on the interference concerns raised in this proceeding.

[33] Note 3, *supra*. Galaxy 1 had been reassigned to 132^0 W.L. in Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 35228 (1985) (*1985 Assignment Order*), but this was readjusted slightly in view of a 1988 U.S.-Canadian-Mexican trilateral arrangement.

[34] *See* Licensing of Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. 2d (P&F) 577 (1983) (*Reducing Orbital Spacing);* Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 94 FCC 2d 129 (1983) (*1983 Assignment Order*), at para. 9.

[35] *See, e.g., 1985 Assignment Order, supra* note 33, at para. 19; *1988 Assignment Order, supra* note 3, at para. 15.

[36] *See, e.g., 1985 Assignment Order, id.*, at paras. 7-14.

[37] For example, GE Americom has moved its in-orbit Satcom 4 satellite one degree in order to conform to its new assignment. Indeed, to accommodate Hughes's Galaxy 5-W satellite (formerly Westar 5-R) when it is launched in November 1991, AT&T will be required to relocate its Telstar 303 satellite before its end-of-life.

[38] This satellite was initially called Galaxy B but its name was changed to Galaxy B-R to avoid confusion with the Galaxy B satellite authorized to Hughes in 1985 but whose license was relinquished.

[39] *See* GE American Communications, Inc., *supra* note 8; *1988 Assignment Order, supra* note 3, at para. 13.

[40] *See* GE Americom Supplement, *supra* note 6, at 2-3.

[41] AT&T's Telstar 302 satellite is currently operating at 85^0 W.L., but that location will become available for reassignment when its replacement -- Telstar 402 -- becomes operational in early 1994. *See 1988 Assignment Order, supra* note 3, at para. 12.

[42] *See, e.g.*, GTE Spacenet Corporation, 2 FCC Rcd 55 (1987) (GTE Spacenet free to substitute Spacenet IV satellite for Spacenet III satellite at 87^0 W.L. after Spacenet III launch failure). *See also* Western Union Telegraph Company, 86 FCC 2d 196, 209 (1981).

[43] Given the large number of authorized satellites today and differing satellite designs, the Commission generally designates a specific satellite for a specific location in an assignment plan. However, many of the earlier assignment plans did not contain specific satellite names. *See, e.g., 1983 Assignment Order, supra* note 34; Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 84 FCC 2d 584 (1981) (*1980 Assignment Order*).

[44] Given the rapidly changing technology in the satellite industry and the uncertain nature of traffic growth projections over time, the Commission does not consider applications for either expansion or replacement satellites that are intended to be launched more than five years from grant. *See* Licensing Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (1985), at n. 43 and para. 28. Presumably, this is why GE Americom has not yet filed an application for Satcom C-2.

[45] *See 1988 Assignment Order*, *supra* note 3, at n. 31.

[46] *See* note 43, *supra*.

[47] *See, e.g.*, Filing of Applications for New Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. 2d (P&F) 565 (1983), at para. 2. *See also* Ashbacker v. FCC, 326 U.S. 327 (1945).

[48] This satellite was initially called Galaxy 5.

[49] *See* Hughes Communications Galaxy, Inc., *supra* note 1, at para. 19.

[50] *See* para. 18, *supra*.

[51] *See* note 40, *supra*.

[52] *1988 Assignment Order*, *supra* note 3, at para. 12 (emphasis added).

[53] *See, e.g.*, American Telephone and Telegraph Company, 2 FCC Rcd 4431 (1987) and MCI Communications Corp., 2 FCC Rcd 233 (1987) (economic factors not considered circumstances beyond licensee's control and therefore not a sufficient basis on which to grant an extension of construction and launch milestones).

[54] *See* note 43, *supra*.

[55] *See, e.g.*, paras. 12, 23 and note 40, *supra*, and para. 30, *infra*.

[56] Our rules provide that one location for an expansion satellite in each frequency band may be granted to each licensee in a given processing round. *See* 47 C.F.R. § 25.391(h). GE Americom was granted an expansion location at 79^0 W.L. for a hybrid 4/6/12/14 GHz satellite in the 1988 processing group. Allowing GE Americom to hold 81^0 W.L. after its replacement satellite has been reassigned to 135^0 W.L. would allow it to occupy an additional expansion location contrary to our rules.

[57] Indeed, GE Americom sought a reassignment to 85^0 W.L., where Telstar 302 is currently operating, after the satellite intended to replace it was launched into a different location. *See* para. 22, *supra*.

[58] *See* para. 25, *supra*.

[59] We note that GE Americom's authorization for Satcom C-4 requires the satellite to be launched no later than August 1993. *See* GE American Communications, Inc., *supra* note 2, at para. 14.

[60] *See* comments of STLC, Salomon Brothers. *See also* comments of EDS.

[61] *See* comments of Contel ASC.

[62] *See* comments of STLC.

[63] *See* comments of Contel ASC.

[64] *See* comments of Contel ASC.

[65] *See* reply comments of AT&T and GTE Spacenet.

[66] *See, e.g.*, GE American Communications, Inc., *supra* note 8, at para. 2; *1985 Assignment Order*, *supra* note 33, at para. 19.

[67] In an amendment to its MSS application filed in January 1989 in response to a request made by the Common Carrier Bureau in the *MSS Licensing Proceeding* (Gen. Docket No. 84-1234), AMSC proposed the 62^0 W.L., 101^0 W.L., and 137^0 W.L. locations for its satellites, the 12/14 GHz bands for feeder links for the eastern and western satellites, and the 10.7-10.95, 13.0-13.15, and 13.2-13.25 GHz bands for feeder links for the central satellite. It stated that these amendments were made in the alternative to its petition for reconsideration in this proceeding. AMSC's application, as amended, was granted subsequent to the *1988 Assignment Order*, which is under reconsideration here. *See* Memorandum Opinion, Order and Authorization, Gen. Docket 84-1234, 4 FCC Rcd 6041 (1989) (*MSS Authorization Order*). Neither AMSC nor any other entity filed for reconsideration of the feeder link portion of the *MSS Authorization Order*.

[68] Fixed-satellites operating in the 12/14 GHz band are allocated to use 500 MHz of spectrum for uplink transmissions (14.0-14.5 GHz) and 500 MHz for downlink transmissions (11.7-12.2 GHz). Under AMSC's proposal, AMSC would use 100 MHz of this spectrum, and the domestic fixed-satellite operator would use 400 MHz.

[69] *See 1988 Assignment Order*, *supra* note 3, at para. 7.

[70] *See MSS Authorization Order*, *supra* note 67, at para. 61; Second Report and Order, Gen. Docket No. 84-1234, 2 FCC Rcd 485 (1987) (*MSS Licensing Order*), at para. 30.

[71] AMSC asserts that most 12/14 GHz band satellites, particularly those providing analog video broadcast and interactive data services to very small aperture terminal (VSAT) networks, do not fully use the spectrum available at their assigned locations. It states that VSAT services require a larger proportion of power than bandwidth because of the transmission characteristics of the radiofrequency (RF) carriers. AMSC argues that when the satellite operates, the available transponder EIRP is insufficient to use the full transponder frequency spectrum and thus the transponders operate in a "power-limited" mode. Moreover, it asserts that in many instances, a satellite transponder bandwidth of 54 MHz is used for transmission of a single TV channel which is, in turn, received by ground terminals in a demodulator bandwidth of 24 to 27 MHz, thus wasting 50% of the transponder bandwidth. *See* AMSC Petition for Reconsideration at 9 and Exhibit B at 17-19.

[72] AMSC Petition for Reconsideration at 16.

[73] These are Contel ASC, AT&T, GTE Spacenet, and Hughes. Hughes, whose sister subsidiary Hughes Communications Mobile Satellite, Inc. is a member of AMSC, states in its comments that it "disassociates itself from AMSC's reconsideration request." Hughes Comments and Opposition at 13.

[74] AT&T states that the new satellites authorized in November 1988 feature higher transmission powers and larger numbers of transponders, enabling them to use the full 500 MHz of spectrum. *See* AT&T Opposition at 6. Furthermore, GTE Spacenet states that contrary to AMSC's claim, its VSAT services are typically "bandwidth limited" -- not "power limited" -- due in part to the Commission's limitations on maximum EIRP density for routine licensing and the necessity to avoid some transponder bandwidth to prevent interference from cross-polarized transponders, adjacent satellites, and inter-modulation products. It states that reducing the available bandwidth would therefore result in a significant reduction in capacity. GTE Spacenet also states that it regularly uses dual video operation, in which the entire transponder bandwidth is used. *See* GTE Opposition and Comments at 11-12.

[75] Geostar suggests the 6.5/11 GHz and 20/30 GHz band as practical alternatives.

[76] In this connection, GTE Spacenet states that by granting AMSC's request, the Commission runs the risk of opening up limited 12/14 GHz frequencies to all mobile satellite operators.

[77] Most of these issues were discussed in the context of granting AMSC a license for its MSS system in the *MSS Authorization Order*, *supra* note 68, at paras. 74-81. We nevertheless discuss them again here briefly.

[78] *See* applications of AT&T, Contel ASC, Hughes and NEXSAT.

[79] The Commission suggested the 6425-6725 MHz bands, the 17.8-20.2 GHz bands and the 27.5-30.0 GHz bands as alternatives to the 12/14 GHz band. It also stated that a voluntary arrangement between AMSC and a fixed-satellite operator to co-locate their satellites would be acceptable. We note that Hughes, whose sister corporation is a member of AMSC, is assigned to the 99^0 W.L. 12/14 GHz location and to other 12/14 GHz locations in the eastern and western portions of the arc.

[80] *See MSS Authorization Order, supra* note 68, at paras. 65-73.

[81] The Commission did not allow AMSC to operate a mobile satellite from its requested 137^0 W.L. location because this is in the western arc reserved for high power density 12/14 GHz band domestic fixed-satellites. *See* GE American Communications, Inc., note 8, *supra*. The Commission therefore assigned it to the next available location at 139^0 W.L.

[82] *See 1988 Assignment Order, supra* note 3; *1985 Assignment Order, supra* note 33; *1980 Assignment Order, supra* note 42; *see also* Domestic Communications Satellite Facilities, 22 FCC 2d 86 (1970).

[83] As noted in the *MSS Authorization Order*, we believe that a waiver of our requirement to use the entire 500 MHz of spectrum at each location is appropriate here. *See MSS Authorization Order, supra* note 68, at para. 79. Rather than continuing to hold these "fringe" locations in abeyance until and if they are requested by domestic fixed-satellite applicants, we believe that the public interest would be better served by allowing AMSC to use 100 MHz of spectrum at each location, thus allowing mobile satellite services to be made available in the most expeditious manner possible.

[84] AMSC had initially requested 12/14 GHz orbital locations at 75^0 W.L., 101^0 W.L., and 136^0 W.L.

[85] We disagree with AMSC's contention that if we require co-location, orbital locations would still be fungible since the MSS satellite could operate within a range of locations. This, according to AMSC, would allow us the flexibility to reassign the MSS satellite to a different location if necessary. This misses the point. Requiring co-location would require the domestic fixed-satellite operator assigned to that location to operate at less than full capacity, that is, over only 400 MHz, and therefore that location would no longer be equivalent to one in which the entire 500 MHz is available. Thus, a hearing or other proceeding may be required before a particular operator could be assigned to that location.

[86] Because AMSC will be operating its feeder links as a primary user of the band, we will not place on it the burden of coordinating its feeder link operations with adjacent satellites, as GTE Spacenet suggests. Given the technical characteristics of the feeder link signal, we expect that AMSC and adjacent fixed-satellite operators should generally be able to accommodate each other's telecommunications service requirements. In assigning AMSC to 139^0 W.L., however, we emphasize that we are not altering our policy to accommodate state-of-the-art high power density domestic fixed-satellites in the arc from 133^0 W.L. to 137^0 W.L. Thus, it is possible that a high-power density fixed-satellite may ultimately be assigned to any of these locations. While we believe that most potential interference problems should be able to be resolved through the mutual efforts of the parties, it is possible that AMSC may suffer some unavoidable interference at 139^0 W.L. Should AMSC perceive this to be a problem, it may request to be reassigned to 141^0 W.L.

[87] *Supra* note 68, at para. 135.

APPENDIX

ORBITAL ASSIGNMENTS

143^0 W.L.	Aurora 1	4/6 GHz (vertical)
141^0 W.L.	unassigned	4/6 GHz (horizontal)
139^0 W.L.	Aurora 2	4/6 GHz (vertical)
139^0 W.L.	AMSC	12/14 GHz
137^0 W.L.	Satcom 1-R/C-1	4/6 GHz (horizontal)
137^0 W.L.	unassigned	12/14 GHz
135^0 W.L.	Satcom C-4	4/6 GHz (vertical)
135^0 W.L.	unassigned	12/14 GHz
133^0 W.L.	Galaxy 1/1-R	4/6 GHz (horizontal)
133^0 W.L.	unassigned	12/14 GHz
131^0 W.L.	Satcom 3-R/C-3	4/6 GHz (vertical)
131^0 W.L.	Galaxy B-R	12/14 GHz
129^0 W.L.	ASC 1/Contelsat 2	4/6 GHz (horizontal)/12/14 GHz
127^0 W.L.	Spotnet 2	4/6 GHz (vertical)/12/14 GHz
125^0 W.L.	Westar 5/Galaxy 5-W	4/6 GHz (horizontal)
125^0 W.L.	GSTAR 4	12/14 GHz
123^0 W.L.	Telstar 303	4/6 GHz (vertical)
123^0 W.L.	SBS 5	12/14 GHz
121^0 W.L.	GSTAR 1/1-R	12/14 GHz
105^0 W.L.	GSTAR 2	12/14 GHz
103^0 W.L.	Spacenet 1-R	4/6 GHz (horizontal)/12/14 GHz
101^0 W.L.	Contelsat 1	4/6 GHz (vertical)/12/14 GHz
99^0 W.L.	Westar 4/Galaxy 4-R	4/6 GHz (horizontal)
99^0 W.L.	Galaxy A-R	12/14 GHz
97^0 W.L.	Telstar 301/401	4/6 GHz (vertical)/12/14 GHz
95^0 W.L.	Galaxy 3/3-R	4/6 GHz (horizontal)
95^0 W.L.	SBS 3	12/14 GHz
93^0 W.L.	Spotnet 1	4/6 GHz (vertical)/12/14 GHz
91^0 W.L.	Galaxy 6	4/6 GHz (horizontal)
91^0 W.L.	SBS 4	12/14 GHz
89^0 W.L.	Telstar 402	4/6 GHz (vertical)/12/14 GHz
87^0 W.L.	Spacenet 3	4/6 GHz (horizontal)/12/14 GHz
85^0 W.L.	Telstar 302	4/6 GHz (vertical)
85^0 W.L.	Satcom K-1	12/14 GHz
83^0 W.L.	ASC 2	4/6 GHz (horizontal)/12/14 GHz
81^0 W.L.	Satcom 4/Galaxy 5-E	4/6 GHz (vertical)
81^0 W.L.	Satcom K-2	12/14 GHz
79^0 W.L.	Satcom H-1	4/6 GHz (horizontal)/12/14 GHz
76^0 W.L.	Comstar D-2/D-4	4/6 GHz (vertical)
76^0 W.L.	unassigned	12/14 GHz
74^0 W.L.	Galaxy 2/2-R	4/6 GHz (horizontal)
74^0 W.L.	SBS 1/2	12/14 GHz
72^0 W.L.	Satcom 2-R	4/6 GHz (vertical)
72^0 W.L.	SBS 6	12/14 GHz
69^0 W.L.	Spacenet 2/2-R	4/6 GHz (horizontal)/12/14 GHz
67^0 W.L.	unassigned	4/6 GHz (vertical)
67^0 W.L.	unassigned	12/14 GHz
64^0 W.L.	unassigned	4/6 GHz (horizontal)
64^0 W.L.	GSTAR 3	12/14 GHz
62^0 W.L.	unassigned	4/6 GHz (vertical)
62^0 W.L.	AMSC	12/14 GHz

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of Congaree
Broadcasters, Inc.
Licensee of WSCQ(FM)
West Columbia, South Carolina

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: December 20, 1989; Released: January 10, 1990

By the Commission:

1. The Commission has before it the license renewal application of Congaree Broadcasters, Inc., for Station WSCQ(FM), West Columbia, South Carolina. On November 1, 1988, the National Black Media Coalition and various branches of the NAACP (NBMC/NAACP) filed a petition to deny against 35 radio stations located in the states of North Carolina and South Carolina, including WSCQ(FM). The petitioners have since withdrawn their petition regarding WSCQ(FM) and eight other stations.[1] Nonetheless, it is our practice in all cases to review a station's equal employment opportunity (EEO) program and performance pursuant to Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. Section 309. Review of the EEO record of WSCQ(FM) for the license term reflects a failure to comply with the Commission's EEO Rule.

2. Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by a licensee.

3. When the renewal application indicates an absence of evidence of discrimination and an adequate record of EEO efforts, *see* Section 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Section (b) and (c), it is granted, if otherwise appropriate. When the application indicates evidence of an inadequate record of EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, the submission of a modified EEO program, renewal for less than a full term, a forfeiture, or a combination thereof. Further, if substantial and material questions of fact exist or if we otherwise cannot find that grant of the application would be consistent with the public interest, we designate the application for hearing. 47 U.S.C. Sec. 309(d)(2); *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending; see* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See also Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Bilingual - Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978).

4. Information received in response to the staff inquiry indicates that the station filled 20 full-time positions (15 upper-level) from January 1, 1984 to January 1, 1988. In its EEO program the station reported as recruitment sources the *Black News* publication and Benedict College, a predominantly black institution, but the response to our inquiry does not show that these sources were contacted to fill any of the 20 full-time positions. It appears that for approximately 12 positions, no recruitment occurred because the station did not solicit from outside sources. For the remaining eight positions, the station placed advertisements in a general newspaper for seven sales jobs and contacted the Urban League to fill one clerical position. Of the applicants resulting from the newspaper ads, no blacks were listed. The Urban League referred a black clerical and a black applicant for another clerical position resulted from an employee referral.[2]

5. The data indicate that the station did not interview a black for any upper-level full-time job. During the period under review, one Asian American/Pacific Islander was hired for an upper-level position and two blacks were hired for clerical positions. Thus, of the 20 vacancies, including 15 upper-level positions, the station hired two blacks for lower-level positions, one in 1984 and the other in 1987. [3]

6. Regarding the program's effectiveness, the licensee states that "[w]e have done the best we know how to fulfill our EEO obligations and to abide by the high standards set forth by the National Association of Broadcasters and by the South Carolina Broadcasters Association."[4] However, the present general manager, one of four owners, concedes that he did not write any recruitment letters for five positions filled. While the licensee believes that two former general managers made EEO recruitment efforts, there are no records of those efforts.

7. We conclude that the licensee's documented EEO efforts were clearly inadequate and that the licensee did not assess the sufficiency of its recruitment practices. Had it done so, the licensee would have seen that black applicants were not forthcoming and could have made appropriate adjustments. This efforts failure spanned a significant period of time, at least 4 years, and involved substantial numbers of hiring opportunities.

8. While there is no evidence that the licensee intentionally discriminated against blacks and thus this case does not warrant designation for a hearing, *compare Beaumont; Bilingual*, we find it appropriate to impose sanctions and remedies as indicated below. In particular, we find that the licensee generally did not obtain black applicants, did not consistently contact sources likely to generate black applicants, and did not take adequate steps to change the station's unsuccessful recruitment practices until the pendency of the license renewal application. Its continuing use of non-productive general recruitment sources is not an indication of affirmative efforts.

9. Comparing this record with the record of the licensee in *Stations WSBY / WQHQ - FM*, 4 FCC Rcd 6160 (1989), where we imposed a short-term renewal with re-

porting conditions, and a $15,000 forfeiture, we conclude that a short-term renewal, subject to reporting conditions, and a forfeiture in the amount of $10,000 for the apparent repeated violations of Section 73.2080 (c)(2) and (5) of the Commission's Rules, 47 C.F.R. Section 73.2080 (c)(2) and (5), are warranted. Like the licensee in *WSBY / WQHQ*, no significant recruitment efforts were made to recruit blacks for upper-level positions. Unlike the licensee in *WSBY / WQHQ*, however, the licensee in the instant case did interview blacks, albeit few, and did hire two blacks for lower-level positions and another minority, albeit not from the dominant minority group, for an upper-level position.[5] In short, the licensee did not make required efforts to recruit blacks, nor did it review the results of its efforts in an appropriate or timely manner. Accordingly, we are imposing the sanctions and remedies discussed herein.[6]

10. Accordingly, *IT IS ORDERED*, that the license renewal application for Station WSCQ(FM) *IS GRANTED FOR A SHORT TERM* ending August 1, 1992, subject to the EEO conditions specified herein.

11. *IT IS FURTHER ORDERED*, that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, this document constitutes a *Notice of Apparent Liability for forfeiture of $ 10, 000* for the licensee of Station WSCQ(FM).[7]

12. *IT IS FURTHER ORDERED*, that the licensee of Station WSCQ(FM) file an original and one copy of the following on August 1, 1990, August 1, 1991 and on August 1, 1992:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[8]

(b) a list of employees as of the July 1, 1990 payroll period for the first report and as of the July 1, 1991 and July 1, 1992 payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the station's efforts to recruit minorities for each position filled during the 12 - month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

13. *IT IS FURTHER ORDERED* that the Mass Media Buerau send by Certified Mail -- Return Receipt Requested one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

14. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should you have any questions regarding this action or require further information concerning the employment reports, you may telephone the Mass Media Bureau's EEO Branch at (202) 632-7069. With respect to the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this letter. Any comments concerning your ability to pay should include those financial items set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Other stations in North Carolina and South Carolina will be addressed separately.

[2] West Columbia is part of the Columbia MSA which includes 46.3% women and 25.8% minorities (24.1% blacks). The station's Annual Employment Reports for the 1981 - 1988 license term reveal a full-time staff that varied between 20 (1982) and 16 (1983-1985) employees overall and 17 (1982) and 13 (1985) employees in the upper-four job categories. Three of the reports (1982, 1985 and 1988) show one black full-time employee in a clerical position. None of the reports reflect employment of a black in a full-time upper-level position. Our review indicates that the station's efforts toward women were adequate.

[3] Additional information furnished by the licensee shows that another black clerical worker was hired prior to January 1984.

[4] In its April 20, 1989 letter, the licensee indicates that it recently hired a Minority Consultant to assist the station in meeting its FCC obligations. Inasmuch as this consultant is not mentioned in the licensee's opposition, dated December 2, 1988, we conclude that the consultant was hired after the license term expired. While we believe that this hiring is a step in the right direction and can be considered for the next renewal period, it is post-term for the current period and thus is not considered herein. *Rust Communications Group, Inc.*, 73 FCC 2d 39 (1979).

[5] *See Application of the Maycourt Company for Renewal of Licenses of WBBE(AM)/WMGB-FM, Geogetown, KY,* 4 FCC Rcd 8255 (1989) (concerning non-dominant minorities).

[6] We are mindful of the conditional assignment of the license of WSCQ(FM) from Congaree Broadcasters, Inc. to WSCQ, Inc. We intend that the forfeiture be assessed on the assignor and that the short-term renewal and reporting conditions pass automatically to the assignee. *See Woolfson Broadcasting Corporation,* 4 FCC Rcd 6160 (1989).

[7] In regard to the forfeiture, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in an attachment to this *Memorandum Opinion and Order and Notice of Apparent Liability*. Any comments relating to ability to pay should include those financial items set forth in the noted attachment.

[8] Such a list might start:

1. News Director: Officials and Managers; Full-time

3 Applicants:	1 white female	A.W.R.T.
	1 black male	Urban League
	1 black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP: Selected: black male (03/15/91)

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 20, 1989

Released: December 29, 1989

Mr. David Coppock
President
Colonial Broadcasting, Inc.
4220 N. Davis Highway
Pensacola, FL 32513

Dear Mr. Coppock:

This refers to your application for renewal of license of station WOWW of Pensacola, Florida (BRH-881003VB) and a petition to deny filed by the Florida State Conference of Branches of the NAACP, its respective branch operating within the service area of your station, and the National Black Media Coalition. Subsequent to the filing of the petition to deny, the petitioners withdrew the petition and asked the Commission to renew your license. Notwithstanding the withdrawal of the petition to deny, we have reviewed WOWW's EEO program and performance pursuant to our authority under Section 309(a) of the Communications Act of 1934, as amended. 47 U.S.C. Section 309. That review has revealed a failure to comply with the Commission's EEO rules.

Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee.

When a renewal application indicates an absence of evidence of discrimination and an adequate record of EEO efforts, the application is granted, if otherwise appropriate. When the application indicates an inadequate record of EEO efforts, *see* Section 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Section 73.2080 (b) and (c), the Commission may impose a variety of sanctions, such as reporting conditions, the submission of a modified EEO program, renewal for less than a full term, forfeiture, or a combination thereof. Further, if substantial and material questions of fact exist or if we otherwise cannot find that a grant of the application would be consistent with the public interest, we designate the application for hearing. 47 U.S.C. Sec. 309 (d)(2); *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending; See* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See also Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Bilingual - Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978).

Our review of your renewal application reveals no evidence of intentional discrimination but does reveal a record of inadequate EEO efforts. In your EEO Program Report covering the period from October 1, 1987, through October 1, 1988, you stated that no minority recruiting had been done "due to staff cut-backs." Despite that fact, you reported hiring four salespersons during this time period.

Due to our concern that vacancies were continually being filled in the face of a suspension of recruitment efforts, we requested details regarding your hiring practices. In your July 1989 response to our inquiry, you reported that the former General Manager, who prepared and signed the license renewal EEO program, left the station in March 1989. You also reported that the station's EEO records revealed nine, rather than four, full-time, upper-level hires during the renewal year, all non-minorities, but did not provide an explanation for the discrepancy.[1] Also, you provide no explanation why a reduction in staff prevented you from recruiting qualified females and minorities when filling the nine upper-level positions. Furthermore, the supplemental data indicated that you did not contact recruitment sources listed in the EEO program during the period from 1984 to 1988. Of the 30 upper-level hires, eight appear to be "walk-ins," and the remainder were either referred by current employees or were individually recruited, as were the nine employees hired during the renewal year.

Because your EEO program implied that your reduction of staff size excused your EEO recruitment obligations and you offered no explanation for the discrepancy in the number of hiring opportunities stated in your EEO program (four) compared to your response to our letter of inquiry (nine), we asked you to clarify these two issues. In a letter, dated November 13, 1989, you stated that "contrary to what the General Manager suggested in the EEO program, our cutbacks did not result in no recruiting when a position opened." You further stated that the discrepancy between the number of hires stated in the EEO program and the later response occurred because the former General Manager "simply did not appropriately review all the files before completing the renewal and thus inadvertently included incomplete or inaccurate data." You state that when you prepared the July response to our letter of inquiry, "you double checked all information and . . . made the appropriate corrections."[2]

These explanations clarify the basis for the varying hiring data you submitted. However, while you assert that recruiting for vacancies was not abandoned, as initially stated, our review of the recruitment efforts reported in your submissions revealed that they did not seek to advance EEO objectives. [3] David Coppock, President, states that "there were no black applicants, to my knowledge, as a result of recruitment activity." We note, however, that of 38 over-all hires during the license term five were black female clerical workers, one was a black reporter and one an Hispanic sales person. Thus, there were at least seven successful minority applicants during the license term. Further, you failed to use minority

recruitment sources when filling vacancies. Moreover, during the license term you failed to analyze recruitment efforts and make corrections in order to attract qualified minorities, especially when recruiting for jobs in the upper-level categories.

We require licensees to make adequate efforts to assure that qualified minorities and women are included in the applicant pool for all vacancies. The cutback in staff size did not release you from your obligation to recruit minorities and women when filling those vacancies which you concede did occur. Active recruitment efforts, coupled with an ongoing self-analysis of these efforts, are critical to the success of any EEO program.[4]

This case is similar to *Applications for Renewal of License of Stations WOOJ (AM) / WOOJ (FM), Lehigh Acres, FL*, 4 FCC Rcd 6178 (1989) (*WOOJ (AM) / WOOJ (FM)* where we granted a full-term renewal subject to reporting conditions and a Notice of Apparent Liability for a $15,000 forfeiture. Like the licensee in *WOOJ (AM) / WOOJ (FM)*, you failed to contact minority referral sources for specific job openings as contemplated by our rules. Also, like the licensee in *WOOJ (AM) / WOOJ (FM)*, you indicate that a large percentage of your vacancies were not recruited for, but rather were filled by individuals submitting unsolicited applications. *See* 47 C.F.R. Section 73.2080 (c)(2). In addition, it appears that, like the licensee in *WOOJ (AM) / WOOJ (FM)*, you failed to engage in a meaningful self-evaluation of your EEO efforts, as required by the Commission's rules. However, this case is exacerbated by the inaccurate information regarding the number of hires made during the renewal year and the wholly inadequate justification for your failure to recruit minorities and women. Therefore, on the basis of this entire record, we are imposing reporting conditions for three years and issuing a Notice of Apparent Liability for $18,000.

In sum, the evidence reveals repeated failures to comply with the affirmative action provisions set forth in Section 73.2080 (b)(3) and (5) and 73.2080 (c)(3) and (5) of the Commission's rules, 47 C.F.R. Sections 73.2080 (b)(3) and (5) and 73.2080 (c)(3) and (5). Accordingly, while we find that the grant of the applications will serve the public interest, we find it appropriate to impose periodic reporting conditions,[5] and impose a forfeiture of $18,000 on the present licensee of WOWW for past rule violations.

Accordingly, *IT IS ORDERED*, That the applications for renewal of license of Station WOWW *IS GRANTED*, subject to the reporting conditions specified herein.

IT IS FURTHER ORDERED, That the application to assign the license of station WOWW subject to the reporting conditions specified herein, from Colonial Broadcasting Company, Inc. to Sun Media, Inc. *IS GRANTED*.

IT IS FURTHER ORDERED, That, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, Colonial Broadcasting, Inc., licensee of WOWW, is hereby advised of its apparent liability for forfeiture of $18,000 for reported failures to comply with Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, in the manner described above.

IT IS FURTHER ORDERED, That the licensee of station WOWW submit an original and one copy of the following information on October 1, 1991, October 1, 1992 and October 1, 1993:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[6]

(b) a list of employees as of the September 1, 1991 payroll period for the first report, and as of the the September 1, 1992 and September 1, 1993 payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid to the lowest paid job classification), date of hire, sex and race or national origin; and

(c) details concerning the stations' efforts to recruit minorities for each position filled during the 12 month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, you may submit any information you believe is relevant with regard to the stations' EEO program and your efforts thereunder.

The reports are to be filed with the Secretary of the Commission to the attention of the Mass Media Bureau's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment reports, you may call the Mass Media Bureau's EEO Branch at (202) 632-7069. Regarding the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this letter. Any comments relating to your ability to pay should include those financial items set forth in the noted attachment.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Your response to our inquiry included data on six upper-level vacancies, by date of hire, during the reporting year and three other vacancies which were filled but for which no dates were given. Regarding these latter positions, you state that three former employees (two white males, one white female) were re-hired for full-time announcer positions. Because you refer to these employees after the last announcer hire on the list (August 22, 1988), we assume they were hired after August 22, 1988, but before the end of the reporting period.

[2] In that submission, you also indicated that during this time period, the station hired eight full-time and one part-time employees, not nine full-time employees, as previously indicated in your July response to our initial letter of inquiry.

[3] Two sales employees were actively recruited from other stations and two others were referred by current staff. An announcer was individually recruited, a part-time employee was

picked from among the resumes kept on file at the station, and advertisements were placed in *Broadcasting* and *Radio and Records*. On one occasion, a source listed in the EEO program, the *Pensacola News Journal*, was contacted but not for a particular opening.

[4] The available work force of the Pensacola, Florida Metropolitan Statistical Area (MSA) includes 17.5% minorities (14.3% Black, 1.3% Hispanic, 1.1% American Indian, and .8% Asian). In 1982, of 24 overall employees, three (12.5%) were minorities and of 22 upper-level employees, two (9%) were minorities. However, in 1983, of 24 overall employees, only one (4%) was a minority and no minorities held upper-level positions. Similarly, in 1984, of 25 overall employees, one (4%) was a minority and no minorities held upper-level positions. In 1985, of 25 overall employees, you employed three minorities (12%), two (8.7%) in upper-level positions. However, in 1986, of 26 overall employees, two minorities (7.7%) were employed, only one of whom (4.1%) held an upper-level position. Similarly, in 1987, of 27 overall employees, only two minorities (7.4%) were employed, one of whom (4%) held an upper-level position. And, in 1988, of 21 overall employees, two (9.5%) were minorities, one (5.2%) of whom held an upper-level position.

[5] We are mindful of the recent conditional assignment of the license of WOWW-FM from Colonial Broadcasting Company, Inc. to Sun Media, Inc. We intend that the forfeiture be assessed on the assignor; the reporting conditions pass automatically to the assignee. *See Woolfson Broadcasting, Inc.*, 4 FCC Rcd 6160 (1989).

[6] Such a list might start:

(1) News Director; Officials and Managers; Full-time

3 Applicants:	1 white female	A.W.R.T.
	1 black male	Urban League
	1 black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP

Selected: black male (03/15/91)

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 20, 1989

Released: December 29, 1989

Mr. Michael Buxser
Vice President and General Manager
Station WLVK (FM)
4701 Hedgemore Drive
Suite 801
Charlotte, NC 28209

Re: Application for Renewal of
License of Station WLVK (FM)
Statesville, NC

Dear Mr. Buxser:

This refers to your pending application for renewal of the license of station WLVK (FM), Statesville, North Carolina (File No. BRH-880801ZS).[1] The North Carolina State Conference of Branches of the NAACP, its branches operating in your service area, and the National Black Media Coalition filed a petition to deny on November 1, 1988. By letter dated January 20, 1989, the petitioners moved to withdraw the petition and requested that the Commission renew your license. Nonetheless, it is our practice in all cases to review a station's equal employment opportunity (EEO) program and performance pursuant to Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. Section 309. Review of the EEO record of WLVK (FM) for the license term reflects a failure to comply with the Commission's EEO rule.

Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by a licensee.

When a renewal application indicates an absence of evidence of discrimination and an adequate record of EEO efforts, the application is granted, if otherwise appropriate. When the application indicates an inadequate record of EEO efforts, *see* Section 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Section 73.2080 (b) and (c), the Commission may impose a variety of sanctions, such as reporting conditions, the submission of a modified EEO program, renewal for less than a full term, forfeiture, or a combination thereof. Further, if substantial and material questions of fact exist or if we otherwise cannot find that a grant of the application would be consistent with the public interest, we designate the application for hearing. 47 U.S.C. Sec. 309 (d)(2); *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending; See* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See also Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Bilingual - Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978).

Our review of your renewal application and your response to our inquiry shows no evidence of discrimination but does reveal a record of inadequate EEO efforts. It appears that you did not contact minority recruitment sources when vacancies occurred and that you did not include minorities in the applicant pool. Moreover, it does not appear that you undertook a meaningful self-evaluation of your EEO program as required by the Commission's EEO rule. Had you done so, you would have seen that your recruitment sources have been ineffective in attracting minority applicants, and you would have modified your EEO efforts prior to receiving our inquiry letter.

Your 1988 EEO Program Report (FCC Form 396) lists as referral sources the Charlotte Observer, the Charlotte Post, Queens College, Johnson C. Smith College, the North Carolina Employment Security Commission, an employment agency, and existing employees. You document no referrals from these sources. In an attachment to your EEO Program Report, you state that the Equal Employment Opportunity Commission (EEOC) discourages pre-employment inquiries regarding the race or gender of applicants. You further assert that until the publication of the revised Form 396 (1987), you were unaware that the Commission expected broadcasters to retain such information. You also note that because you generally cannot ascertain a person's race or gender based on his or her resume, you could only obtain such data from interviewees. You submit, however, that this information would be unreliable because so few applicants are personally interviewed.

By letter dated May 12, 1989, we requested additional information regarding your EEO efforts from the time Capitol Broadcasting acquired the station in December 1984 until August 1, 1988. Your submission shows that from August 1, 1987 through July 31, 1988, you hired one lower-level minority among 22 full-time hirees overall, 20 of them in upper level positions.[2] Of 70 ascertainable interviewees, 57 of them for upper-level jobs, the only minority interviewed was the Black female you ultimately hired for a clerical position. That position appears to be the only vacancy for which you contacted a minority referral source. You list the recruitment sources as "Unknown" for 12 of the 22 hirees while the rest, except for the aforementioned clerical position, were filled via non-minority recruitment sources. In addition, you are unable to provide the number of minorities interviewed for 13 positions. For two of those 13 positions, however, you are able to recall the number of persons interviewed overall, as well as the number of female interviewees.

Your earlier recruitment information is even less detailed. From December 1984 through July 1987, you document three lower-level minorities among 53 total hires, 46 in upper-level positions. [3] You fail to list the referral source for all but seven hirees. Moreover, you provide no interviewee data. Your response to our inquiry also notes, however, that you have recently modified your EEO program to yield more minority referrals and that you are keeping more detailed records.[4]

Although the 1988 reporting year is the last reporting year included in the license term under review, which ended on December 1, 1988, you request that we consider WLVK's 1989 employment profile. While we are encouraged by the improvement in WLVK's EEO record, we do not believe that your recent actions are related to EEO efforts made during the license term and we therefore will not consider your 1989 Annual Employment Report. *Rust Communications Group, Inc.*, 73 FCC 2d 39 (1979).

In addition, we are not satisfied with your explanation regarding the lack of recruitment data on your 1988 EEO Program Report. As we stated in *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 4 FCC Rcd 1715, 1716 (1989) (*NAB Report and Order*), the EEOC "has long recognized that information as to an applicant's race and sex can be collected pursuant to an affirmative action plan." The *NAB Report and Order* also discusses the information collection requirements of the updated Form 396, concluding that a licensee can be expected to possess the requested data, especially in light of the requirement that it engage in ongoing assessment of its EEO program. *Id.* We do not doubt that it is difficult to discern a person's race and, to a lesser extent, gender from his or her resume alone. Your claim that few applicants are interviewed, however, is undermined by the fact that you document 75 hiring opportunities during the license term, for which at least 123 persons were interviewed.

We are also concerned that you misunderstand the purpose of our processing guidelines. Your response to our inquiry states that your 1989 Report complies with the guidelines and that "WLVK hired minority employees prior to the end of the subject license term to achieve such compliance." As we have stated, meeting or exceeding the processing guidelines no longer automatically demonstrates that adequate EEO efforts were made. *See Arkansas Educational Television Commission*, 3 FCC Rcd 1923, 1925 (1988).

While this case does not warrant designation for an evidentiary hearing, we find it appropriate to impose sanctions and remedies for your failure to comply with our EEO rule. Your EEO record is similar to that of the licensee in *Woolfson Broadcasting Corporation*, 4 FCC Rcd 6160 (1989) (*WSBY / WQHQ*). In *WSBY / WQHQ*, we found that the licensee neither followed its EEO program nor hired any minorities despite 33 full-time hiring opportunities from February 1986 through September 1988 in an area where minorities constitute 20% of the labor force. The licensee of WSBY/WQHQ used minority recruitment sources for only 14 of those 33 vacancies and received only two minority referrals. Accordingly, we granted a short-term renewal subject to reporting conditions and a $15,000 forfeiture.

Similarly, you do not appear to have followed your EEO program despite 75 hiring opportunities in less than four years. While you did hire some minorities for lower-level positions, your use of non-minority specific sources generally was unproductive. Yet, notwithstanding this fact, your self-assessment was deficient insofar as you document use of minority referral sources for only one of those 75 vacancies. Moreover, your recordkeeping was sporadic until the final year of the license term. Therefore, while we find that grant of the license renewal is in the public interest, we also find it appropriate to grant renewal for a short term, subject to periodic reporting conditions and a Notice of Apparent Liability for Forfeiture in the amount of $15,000.[5]

Accordingly, *IT IS ORDERED*, that the application of Capitol Broadcasting Corporation for renewal of licenses for station WLVK(FM) *IS GRANTED FOR A SHORT TERM* ending November 30, 1992 subject to the reporting conditions specified herein.

IT IS FURTHER ORDERED, that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, Capitol Broadcasting Company is hereby advised of its apparent liability for forfeiture of $15,000 in light of its repeated failure to comply with Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, in the manner described above.

IT IS FURTHER ORDERED, that the licensee of station WLVK(FM) is directed to submit to the Commission an original and one copy of the following information on August 1, 1990, August 1, 1991, and August 1, 1992:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[6]

(b) A list of employees as of the July 1, 1990 payroll period for the first report and as of the July 1, 1991 and July 1, 1992 payroll periods for the second and third reports by job title, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex, and race or national origin; and

(c) Details concerning the stations' efforts to recruit Blacks for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment reports, you may telephone the Mass Media Bureau's EEO Branch ((202) 632-7069). With respect to the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this letter. Any comments concerning your ability to pay should include those financial items set forth in the attachment.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The license of WLVK was conditionally assigned from Capitol Broadcasting Corporation to the Trumper Communications of North Carolina Limited Partnership on September 21, 1989 (File No. BALH-890720HK).

[2] You indicate that a non-minority announcer was promoted from part-time to full-time status. This is not counted as a new hire but as a promotion.

[3] You do not distinguish between part-time and full-time status for positions filled prior to August 1987. It appears that the jobs you list were full-time, since you state that some of the successful candidates were promoted from part-time positions. As we have noted, such persons are not considered new hires. Nor are persons furnished by an employment agency on a temporary basis considered new hires.

[4] The available labor force for Iredell County, the county in which Statesville is located, is 15.9% minority (14.9% Black, .8% Hispanic, .1% Asian/Pacific Islander, .1% American Indian). Your Annual Employment Reports (FCC Form 395-B) filed during the license term show that during the 1988 reporting year, *i.e.*, the 12-month period prior to the end of the license term, WLVK employed 26 persons full-time, 22 of them in upper-level positions. Your 1988 report lists one full-time minority (3.8%), a lower-level Black female. Your 1987 report lists no minorities among 24 overall employees and 20 upper-level employees. Your 1986 report lists one lower-level minority (4.0%) among 25 overall employees and 21 upper-level employees. Your 1985 report lists no minorities among 19 overall employees and 17 upper-level employees.

[5] We are mindful of the conditional assignment of the license of WLVK(FM) from Capitol Broadcasting Corporation to the Trumper Communications of North Carolina Limited Partnership. We intend that the forfeiture be assessed on the assignor and that the short-term renewal and reporting conditions pass automatically to the assignee. *See Woolfson Broadcasting Corporation*, 4 FCC Rcd at 6161.

[6] Such a list might start:

(1) News Director; Officials and Managers; Full-time

3 Applicants:	1 white female	A.W.R.T.
	1 black male	Urban League
	1 black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP

Selected: black male (03/15/91)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of

Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers	**CC Docket No. 87-463**
Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers	**CC Docket No. 89-624**

ORDER

Adopted: December 21, 1989; Released: December 29, 1989

By the Commission:

I. INTRODUCTION

1. By this Order we continue on an interim basis the effectiveness of the current prescription of a 12% overall rate of return for the interstate services of local exchange carriers until such time as the Commission shall have completed a rate of return represcription proceeding pursuant to Part 65 of its Rules. We also establish the pleading cycle for the represcription proceeding, and direct the Common Carrier Bureau to issue as soon as possible a Notice requesting such additional information as will be needed to create a full record in that proceeding.

II. BACKGROUND

2. Part 65 of the Commission's Rules[1] contains procedures and methodologies for prescription of interstate rates of return. The Commission adopted Part 65 in December, 1985.[2] In its first represcription proceeding under these rules, the Commission prescribed a 12% rate of return for the local exchange carriers (LECs) for the 1987-88 period. [3] The Commission contemplated that a new rate of return prescription proceeding would be conducted in 1988, and that the next represcription would be reflected in tariffs taking effect on January 1, 1989.[4]

3. In October, 1987, the Commission issued a Notice of Proposed Rule Making seeking comment on whether changes should be made to the Part 65 rules before the next represcription cycle.[5] The Commission decided in March, 1988, to defer initiation of the next rate of return prescription proceeding for one year, until January 1, 1989, because it needed more time to study the issues raised in that NPRM.[6] In the *Deferral Order* the Commission stated:

> We would conduct a represcription in spite of those problems if we had reason to believe that delaying a represcription would prejudice the interests of consumers. The information that is available to us indicates that this is not the case. The evidence in this record and other publicly available economic and financial data support continuation of the currently prescribed maximum rates of return for the third year. Several carriers provided information demonstrating that long-term interest rate levels at present are at or above the levels when this Commission set the carriers' rates of return in 1986. In light of the relationship between interest rates and the cost of equity, these data support the continuing reasonableness of the currently authorized maximum rates of return.[7]

The Commission also stated that overall cost of capital estimates using then-recent data were close to the estimates relied on in the 1986 prescription. Accordingly, the Commission found that it would be reasonable to extend the 12% prescription "throughout a three year period encompassing 1987-1989."[8]

4. In October, 1988, Ameritech and BellSouth separately filed petitions seeking further extensions of both the filing date for initial rate of return submissions and the prescription period.[9] On December 7, 1988, the Common Carrier Bureau responded to the petitions by postponing the filing date for rate of return submissions until June 30, 1989. The Bureau stated that the request to extend the rate of return prescription period would be dealt with in a subsequent order.[10]

5. On March 16, 1989, the Commission adopted an order proposing to adopt a system of price cap regulation for LECs.[11] On May 3, 1989, the Common Carrier Bureau further deferred the filing date for initial rate of return submissions until 90 days following the release of a Report and Order in CC Docket No 87-463. The Bureau stated that the additional issues raised by the Commission's consideration of price cap regulation would preclude completion of the proceedings in Docket 87-463 in time for carriers to meet the previously established June 30, 1989 deadline.[12] The Bureau qualified its action with the following observation:

> . . . we emphasize that this deferral remains subject to any future Commission action regarding the schedule for filing carrier rate of return submissions. The Commission may choose to issue an order addressing the filing schedule prior to release of a final *Report and Order* in CC Docket 87-463. Moreover, we note that the Commission previously extended the current prescription periods for AT&T and the LECs to include 1989. We do not decide in this Order whether the current prescription period should be extended beyond 1989. The continued viability of the currently authorized rate of return, the need for any extension of the current prescription period, and the possibility of prescribing re-

vised, temporary rates of return until the Commission completes the Part 65 rule modifications will be addressed in a subsequent order.[13]

6. Since at least six months are required to conduct a represcription proceeding under Part 65, the Bureau's action postponing the filing date for initial submissions beyond June 30, 1989, effectively precluded the prescription of a new rate of return following full Part 65 procedures prior to the December 31, 1989 expiration of the previous prescription. On September 21, 1989, a Public Notice was issued seeking updated financial and economic data on which to base an interim rate of return prescription for the interstate services of the LECs.[14] The Public Notice stated:

> It is now proposed to extend, or possibly revise, the current rate of return prescription for a period to last until December 31, 1990, or until a subsequent prescription proceeding is completed, whichever comes first. Beyond the interim steps considered here, a represcription proceeding will be undertaken under Part 65 of the Commission's Rules, as they exist or may be amended. . . .
>
> Interested parties are requested to submit financial data and other comments addressed to the question whether the conditions which supported the 1986 prescription have changed so substantially as to require revision of that prescription.
>
> Any party that would be required to file initial rate of return submissions pursuant to § 65.200(b) of the Commission's Rules [*i.e.*, any Regional Holding Company] is requested to include in its comments the following information: (a) its current embedded cost of debt, with a complete explanation of the manner in which it was computed; (b) its current debt-equity ratio; and (c) the State cost of capital information specified in §65.201(a) of the Commission's Rules. Parties also may submit cost of equity analyses using any reasonable method, provided they include all underlying assumptions, data, and calculations.[15]

III. PLEADINGS

7. Twenty-one parties filed comments or reply comments in response to the Public Notice. Nineteen of these parties are LECs or their representative organizations. One party, the Consumer Coalition, is made up of three entities: Consumer Federation of America; International Communications Association, which is an organization of large telecommunications users; and MCI Telecommunications Corporation, an interexchange carrier. The General Services Administration (GSA) filed comments on behalf of the Federal executive agencies in their capacities as users of telecommunications services.[16]

8. The Regional Holding Companies (RHCs) submitted with their comments the cost of debt information, capital structure, and state cost of capital information requested in the Public Notice. These data, which are not challenged by the parties,[17] are set out in Appendix C (cost of debt and capital structure) and Appendix D (state cost of capital determinations.) Cost of equity estimates were submitted by the United States Telephone Association (USTA), NYNEX, US West, Consumer Coalition, and GSA. The USTA cost of equity submissions were endorsed by each participating LEC. As is usual in rate of return proceedings, the cost of equity estimates are disputed by the parties.

9. In general, the LEC industry takes the position that the Commission cannot and should not make any change in the rate of return prescription in this interim proceeding. The LECs also contend that, if the Commission were to change the rate of return, the rate of return should be raised to reflect increased business risks and resultant higher costs of capital. Consumer Coalition argues that the Commission can and must reduce the rate of return to reflect significantly reduced risks and resultant lower costs of capital.

10. USTA argues that, while current data would support upward revision of the rate of return, an extension of the current prescription would serve the public interest by allowing the Commission sufficient time to complete its proposed revision of Part 65. USTA warns that, because the Commission has previously described the Part 65 procedures as "flawed", any entity adversely affected by a represcription "will link the result to the existence of admittedly-imperfect methodologies."[18] OPASTCO suggests extension of the 12% prescription through 1990.[19] Other LEC parties variously advocate extending the prescription until completion of the Part 65 Rule Making;[20] until 90 days after completion of the Part 65 Rule Making;[21] until the completion of both the Part 65 Rule Making and the price caps proceeding;[22] or until the end of the proposed price caps test period.[23] National Exchange Carrier Association (NECA) adds that a round of supplemental comments might be needed so that the Part 65 Rule Making can address changed circumstances.[24]

A. Procedural arguments

11. Several LECs argue that the Commission cannot legally take any action other than to extend the current 12% rate of return. U S West, BellSouth, and Ameritech argue that this interim proceeding cannot be considered a prescription proceeding because of the absence of the specific procedures contained in the Part 65 rules.[25] In this regard, the carriers cite numerous cases standing for the proposition that, once an agency adopts rules, it must either follow those rules or revise them.[26] Ameritech claims that the notice-and-comment process used in the instant proceeding does not legally satisfy the requirement under §205(a) of the Communications Act that prescriptions be made after "full opportunity for hearing."[27] Carriers also argue that the *Public Notice* gave no indication that the Commission might consider changing the rate of return. They state that the parties relied upon the *Public Notice* in deciding not to present the kinds of evidence they would have presented had they believed a new prescription might be made, and that the only issue raised by the *Public Notice* and properly before the Commission is whether or not the Commission should institute a Part 65 prescription proceeding.[28]

12. Consumer Coalition argues that the LECs' procedural objections are simply an excuse for delay.[29] In its view, the case law establishes a legal hierarchy that places the prevention of unjust and unreasonable rates "way above" the procedure used to achieve that goal.[30] It argues that, since the Commission has already violated Part 65 by failing to represcribe in accordance with the schedule established in §65.102(c), "what is important thus is not how Part 65 can best be upheld but how the Commission

can insure against excessive LEC rates at this point in an expeditious manner, while affording all parties ample procedural opportunities to present their best case."[31] Consumer Coalition argues that the absence of the oral procedures that might be available in a Part 65 proceeding is not fatal because nothing in the Administrative Procedure Act, the Communications Act, or the Constitution requires trial-type procedures in a rate of return proceeding. It argues that, under the applicable case law, a "full opportunity for hearing" under §205 is provided by notice-and-comment procedures.[32] Consumer Coalition also contends that LECs have not been prejudiced by the fact that the Commission has undertaken an interim prescription proceeding while the Commission is still considering possible changes to the Part 65 methodologies, since the Commission has allowed parties to make cost of equity showings using any reasonable methodology. It observes that the LECs have taken full advantage of this latitude by presenting a number of cost of equity estimates using methods other than those specified in Part 65.[33]

B. Comparison of circumstances in 1989 vs. circumstances in 1986

1. Interest rates

13. The LECs present data demonstrating that interest rates are somewhat higher now than they were at the time of the 1986 prescription proceeding. They conclude that these interest rates indicate that the overall cost of capital is now similar to or higher than what it was at that time. They note that, when the Commission extended the current prescription through 1989, it justified that extension on the grounds that interest rates were the same as or higher than they were in 1986.[34]

14. No party seriously disputes that most interest rates are somewhat higher than in 1986. Consumer Coalition argues, however, that the "slight drift upward" detected by the LECs is irrelevant to the determination of their cost of capital. According to Consumer Coalition, interest rates have a delayed impact on the cost of equity, and "[w]hat is significant is the current impact on their capital costs of the tremendous decline in interest rates from 1984 through 1986."[35]

2. LEC business risks

15. LECs claim that their business risks, and thus their costs of capital, have increased since 1986. Several carriers argue that they are increasingly vulnerable to bypass and competition. NYNEX states that it is heavily dependent on business revenues from concentrated metropolitan areas, which are lucrative targets for competitors. NYNEX claims to have lost $438 million in revenues in 1988 to bypass by microwave systems, satellite systems, coaxial cable, and fiber optic networks. NYNEX focuses particularly on Teleport Communications, which serves about 100 major buildings in Manhattan. NYNEX states that Teleport and others claim 46% of the New York City high capacity market. It also notes that it has lost revenues in the intraLATA toll market, and that it has been losing market share in the Centrex-CO and coin telephone markets. NYNEX cites the bypass reports submitted by itself and other carriers in the Docket 87-339 Joint Board Monitoring Program as the most reliable estimates of bypass on the public record.[36]

16. Ameritech states that industry literature is filled with documentation of the expansive growth of alternative local access services. Ameritech notes in particular Metropolitan Fiber System's (MFS) "extensive network" in the Chicago loop. Ameritech states that AT&T and MCI "have even made bypass mandatory" in their recent tariffs offering special financial communications services only between locations served by Teleport in New York City and locations served by MFS in Chicago.[37]

17. U S West states that service bypass in the form of bulk purchase of LEC services also adds to LEC business risks. U S West cites in this regard the recent growth in DS3 services. U S West also notes the appearance in rural areas of companies which provide centralized equal access to independent telephone companies and which carry traffic formerly carried on U S West facilities.[38]

18. According to the Consumer Coalition "[b]ypass has turned out to be the Piltdown Man of telecommunications lore."[39] In its reply comments, Consumer Coalition attacks NYNEX's bypass arguments in detail. The Coalition quotes the critique put forward by MCI in its comments on the Docket 87-339 filings: NYNEX can document only 2.93% of its claimed revenue loss; NYNEX's estimated bypass for New York Telephone in 1988 is "preposterous" in that it equals a "whopping 93.4% of NYT's total actual interstate CCL originating minutes of use." Consumer Coalition contends that many of the bypass technologies cited by NYNEX – microwave systems, DTS, satellite, VSAT, and cable television – are used for purposes that do not constitute bypass, and that NYNEX fails to separate out these uses.[40]

19. Consumer Coalition minimizes the threat to LECs posed by fiber networks such as Teleport and MFS. It states that, even if competitors do claim 46% of the New York City hi-cap market, that market accounts for only .5% of NYT's total revenues. Consumer Coalition argues that NYNEX cannot really be concerned about competition to its hi-cap services because NYNEX prices these services to achieve very high rates of return. It notes that Teleport estimates that only 9% of its traffic bypasses NYT, and that a Commission staff report dated February 17, 1989, described the amount of fiber deployed by alternative networks as "minuscule" compared to the capacity being installed by the LECs. It states that alternative fiber networks cannot provide ubiquitous access, are often dependent on LECs for access, and will not provide an alternative for a substantial portion of interstate access traffic anytime in the near future.[41]

20. LECs seek to demonstrate that the need to modernize the network is much greater than it was in 1986, and that this heightened need for new investment has lead to an increase in investor-perceived risk. U S West cites studies showing that equipment becomes obsolete much faster in the current competitive environment; that large customers demand top quality service; and that business leaders perceive telecommunications infrastructure as critical both to the nation's economic prosperity and to everyday business operations. U S West then argues that, "critical as infrastructure investments are, . . . to an investor such investments are just another element of the overall risk associated with LEC operations."[42]

21. NYNEX argues that infrastructure investments are more risky than they used to be because upgrades must be justified through revenue growth from new products, rather than through cost savings, and because new investments must reach a "critical mass" before they become

worthwhile and thus can no longer be made on an incremental basis. NYNEX focuses directly on investor perceptions of the intentions of regulators, stating that investors are more concerned now than in the past about whether regulators will allow telephone companies the incentives and freedoms needed to bring the Information Age to the public.[43]

22. NYNEX submits with its reply a statement from Professor William H. Davidson of the Graduate School of Business Administration at the University of Southern California, an expert on international industrial competitiveness. He states that the United States has fallen behind other nations in deploying modern telecommunications technologies; that investment in public network infrastructure in the United States is occurring more slowly than in other countries; that the public network's role in the U.S. information economy is uncertain; that price cap regulation is the best approach to providing the proper incentives for network modernization; and that, as long as the FCC retains rate of return regulation, an upward adjustment from 12% is needed to stimulate investment. He supports his arguments with tables comparing network modernization status, depreciation rates and lives, and capital expenditures per access line in Singapore, Japan, the United Kingdom, the United States, France, and Canada.[44]

23. SNET argues simply that the rate of return should not be reduced because reducing the rate of return would make it more difficult to raise the capital needed for improvements to the telecommunications infrastructure.[45]

24. Consumer Coalition states that current network expenditures are no riskier than past network expenditures. It argues that, since LECs can earn a full return on any new investment even if it is not cost-justified on a standalone basis, it is the ratepayers and not the LECs that face the risk of having to pay more for network improvements. Consumer Coalition also states that many network upgrades are software-based and are therefore expensed rather than capitalized; it contends that immediate recoupment of such costs diminishes the risk associated with new investment.[46]

C. Cost of equity estimates

25. USTA submits six estimates of the cost of equity, based on two different comparable firms analyses. All of USTA's estimates are higher than the 14.24% cost of equity implied by the current 12% prescription. In its first analysis, USTA uses cluster analysis to identify 20 firms which it claims are similar to the total telephone operations of the RHCs in terms of size, debt/equity ratio, growth in net sales between 1984-88, variance in operating income 1984-88, and the ratio of cash flow to assets.[47] USTA then calculates cost of equity estimates using (a) a discounted cash flow (DCF)[48] method; (b) a capital assets pricing model (CAPM) method[49]; and (c) a "comparable earnings" method.[50] In its second comparable firms analysis, USTA asserts that the S&P 400 Industrials, while not an exact proxy for interstate access providers, is a relevant benchmark to be used in the process of determining the appropriate interstate access rate of return.[51] USTA makes similar DCF, CAPM, and comparable earnings calculations for the S&P 400 companies. USTA summarizes its results as follows:

Estimation Technique	Cluster	S&P Industrials
Discounted Cash Flow	15.02%	15.31%
Capital Asset Pricing Model	15.83%	15.51%
Earned Returns on Equity	18.50%	15.96%

26. In offering its comparable firms analyses, USTA recognizes that, in the past, the Commission has relied most heavily on estimates of the cost of equity which use the RHCs as surrogates for the interstate access industry. USTA argues that its selection of comparable firms is more appropriate, stating

> The RHCs now participate in many businesses whose risk differ significantly from the risk of providing interstate telecommunications access services. The diversified businesses of the RHCs include cellular telephone, financial services, real estate, and computer maintenance, among others. At this time, a Discounted Cash Flow (DCF) analysis or Capital Asset Pricing Model (CAPM) applied to RHC data alone would produce an estimate of the required rate of return for interstate access services which understates the current cost of capital.[52]

27. The Consumer Coalition questions the creditability of USTA's cluster group of firms. It observes that the betas[53] of the cluster group were more than 25% higher than the betas of the RHCs. Examining the lines of business of the cluster group, it notes that, of the twenty firms in the cluster, six produced beer, beverage or consumer foods, five produced paper and building products, four produced chemicals, two produced pharmaceuticals, one was an aerospace manufacturer, one was a health care provider, and one was in publishing and broadcasting.[54]

28. The Consumer Coalition criticizes the risk indicia that USTA used to obtain its cluster group. It notes that all five of USTA's indicia are non-market related. It states that there is no theoretical basis for using asset size and sales growth as measures of risk; that the link between risk and two more of the indicia, the ratio of cash flow to total assets and the debt ratio, is far stronger for debt holders than for stockholders; and that income volatility is the only USTA risk measure that has any theoretical support in the financial literature. The Consumer Coalition points out that USTA's cluster group has a 37% greater income volatility than the RHCs' operating companies. It concludes that USTA's cluster analysis has neither a firm theoretical basis for its selection criteria nor a plausible group of selected firms.[55]

29. Consumer Coalition characterizes USTA's assertion that the RHCs as total companies are less risky than the interstate access portion of their businesses "an astounding statement." Consumer Coalition contends that diversification is the major source of investor-perceived risk for RHCs, and that nonregulated ventures are a foreseeable cause of future reductions in LEC credit ratings. It argues that estimates of RHC costs of capital probably overstate the cost of capital for interstate access.[56]

30. The Consumer Coalition's expert, Lurito, made two DCF analyses of the RHCs' cost of equity capital. The first was similar to the classic DCF analysis relied on most heavily by the Commission in the 1986 prescription pro-

ceeding. It used the average high-low stock prices for the two months ending September 30, 1989 for Price, the IBES long term growth forecast for Growth, and the dividends of the quarter ending September 30, grown by one half of Growth, for Dividend. He found that the cost of equity capital for the RHCs' was 11.75%.[57] In his second DCF analysis, Lurito made independent estimates of the anticipated next dividend and the long term growth rate for each RHC based upon the growth of dividends and book value per share for the period 1984-88. Lurito concluded on the basis of his second analysis that the cost of equity capital for the RHCs is 11.15%.[58]

31. USTA and others object to the use of the RHCs as industry surrogates, asserting that the RHCs' costs of capital understate the current cost of capital for interstate access services because the RHCs now participate in diversified business activities such as cellular telephone, financial services, real estate and computer maintenance.[59]

32. NYNEX contends that the single Growth version of the DCF understates the cost of equity for the RHCs because the stock prices of these companies reflect investor anticipation that changes in regulatory and legal restrictions will produce far higher long term growth rates at a point beyond the stated time horizon (5 years) of long term analysts' growth estimates from IBES.[60] NYNEX cites recent Wall Street market letters that estimate that between 14% and 39% of the RHCs' market prices are attributable to cellular. NYNEX's witness, Willard T. Carleton, states that in addition to cellular, a large but unmeasurable part of RHC market values is based on nonregulated prospects even though the current nonregulated book value component of the RHCs' equity is small, and that it is reasonable to assume that an additional unmeasurable amount of the RHCs' market prices is attributable to investor expectations that the MFJ and other legal restrictions will ultimately be relaxed.[61] NYNEX also provides the testimony of a security analyst, Robert B. Morris. Morris argues that the valuations of the cellular franchises have increased in private market sales and that has caused investors to focus more on the long term growth potential of the telecommunications industry.[62]

33. LECs also argue generally that using RHCs or any regulated utilities to prescribe an allowed rate of return suffers from circular reasoning and that the rate of return should be determined by examining comparable unregulated firms.[63] The Consumer Coalition argues that there is no circularity with market based methods [e.g., DCF and CAPM] since they are based on the independent analyses of investors. Investors evaluate the same variables to decide what price they are willing to pay for a share of stock whether it is a share in an RHC, another utility, or a nonregulated firm.[64]

34. The LECs raise a number of objections to Lurito's second DCF analysis. They argue that his use of the most recently paid dividend, rather than the expected next period dividend, is incorrect; that his continuous dividend version of the DCF model is less accurate and produces a lower return estimate than the quarterly version used by USTA; and that his growth estimates are speculative, inappropriately based upon historic data, and below the IBES consensus forecasts of long term growth.[65]

35. Ameritech objects to the DCF methodology, arguing that the DCF is a market value approach while the ratebase, to which the prescribed rate of return is applied, is measured using a book value approach. Ameritech proposes to substitute book value per share for the market price per share in the DCF formula. The Consumer Coalition disputes Ameritech, pointing out that the DCF theory assumes that investor's dividend growth expectations are based upon the size of the company's book equity, not its stock price.[66] It notes that under Ameritech's proposal investors would drive the RHCs' stock prices ever higher since regulation would continuously raise the allowed level of earnings by applying the cost of equity to the ever increasing market price. [67]

36. A number of other cost of equity estimates are also offered. Most of these are within the range bounded by the USTA and Consumer Coalition estimates. These estimates are summarized in Appendix E.

IV. DISCUSSION

37. The legal standards governing the determination of rates of return are well established: a regulated company must be allowed a return that is sufficient to attract new capital to the business, and that is comparable to the return that would be expected for an unregulated enterprise having the same degree of risk.[68] The return must not be so low as to produce rates that are confiscatory in the constitutional sense[69] nor so high as to produce excessive rates for consumers.[70] Ratemaking under the "just and reasonable" standard thus involves balancing investor and consumer interests[71] and then selecting an appropriate rate of return that is within a broad "zone of reasonableness"[72] established by the judicial standards.

38. Ratemaking is prospective. It is not an exact science. It involves both quantitative and qualitative judgments and predictions of the future. Courts have repeatedly observed that "neither law nor economics has yet devised generally accepted standards for the evaluation of ratemaking orders,"[73] and that rate of return decisions are policy determinations in which agencies must exercise their judgment and expertise.[74] A regulatory agency is allowed wide latitude to choose methods and procedures for determining rates of return, and to make pragmatic adjustments called for by particular circumstances.[75]

39. The Commission adopted Part 65 to establish a workable framework within which it could exercise its judgment and expertise to represcribe rates of return on a regular, biennial schedule. The fact that the established schedule was not met, and an anticipated Part 65 proceeding was not begun in time to complete a full-scale represcription proceeding this year, does not excuse this Commission from its statutory responsibilities. The Communications Act requires that rates be just and reasonable. We therefore reject the LEC contention that we are without authority to prescribe an interim rate of return in this proceeding. If the current rate of return is outside the zone of reasonableness, then rates targeted to that rate of return will be unlawful; we cannot cite adherence to procedural rules of our own making as a reason to perpetuate such a situation.[76]

40. On the other hand, we find merit in the concern of parties that the brevity of this proceeding might not have provided sufficient opportunity for exploration of all relevant issues. Although a great deal of data has been submitted, and parties have cooperated by making additional submissions when requested to do so by the staff, the truncated schedule did not allow complete analysis of the data. This is particularly true with respect to the large amount of potentially significant material and expert

opinion that was submitted in the reply comments. Therefore, unless we find that the 12% prescription is outside the broad zone of reasonableness, the public interest will best be served by continuing the current prescription in effect until we have carried out a represcription proceeding using the procedures contained in Part 65.[77]

41. The record before us is mixed. Consumer Coalition presents cost of equity estimates, one of which uses the methodology we relied most heavily upon in the last represcription proceeding, which, if accepted, would indicate that capital costs have decreased since 1986. The LECs offer a number of estimates which, if accepted, would support the conclusion that there has been an increase in capital costs. Each group strenuously attacks the methodologies and assumptions of the other. We find that it would be premature to resolve these methodological issues based on the record of this abbreviated proceeding, since any findings we might make with respect to methodologies could affect our future prescription proceedings.

42. Parties also adopt diametrically opposed stances on such important issues as the impact of competition and of the need for improvements to the telecommunications infrastructure. LECs see alarming levels of competitive risk, while Consumer Coalition portrays assertions with respect to bypass as unfounded; but their pleadings taken together do not provide us with a sound basis upon which to determine whether business risk due to competition has increased or decreased since the last rate of return prescription was made.[78] Similarly, the competing assertions concerning whether investment in new plant is a source of increased risk do not provide the kind of factual record needed to determine what regulatory action might be necessary to promote infrastructure improvements.

43. Even where data are undisputed, the parties offer differing interpretations. The State cost of capital information shows that many states currently allow earnings of 12% or more on intrastate telephone service, but that those states which have made new determinations in the last two years have made lower prescriptions.[79] The LECs contend that these state determinations should be ignored as irrelevant. Interest rates are very close to the levels which prevailed at the time of the 1986 prescription. The LECs interpret the interest rate information as supporting at least the retention of the 12% rate of return; Consumer Coalition claims that the 12% prescription did not fully reflect the 1984-86 decrease in interest rates, and that it is now time to recognize the long-term nature of that decrease by making a corresponding reduction in the allowed rate of return.

44. In the past, the Commission has been reluctant to alter the rate of return based on a change in the cost of equity component on less than a full record. This is in contrast to our practice of adjusting the rate of return based on changes in the more objectively ascertainable cost of embedded debt or debt-equity structure.[80] We have followed this cautious approach in the past when AT&T has requested an increase in the rate of return and have declined to adjust the rate of return on the basis of changes in the cost of equity without a full record.[81] We conclude that a consistent approach is appropriate in this case. We are very reluctant to adjust the LECs' rate of return based on allegations of change in the cost of equity, on less than a full record, particularly where the rate of return is effective on an interim basis only, and may be adjusted when the full proceeding is complete.

45. We find that, while this truncated proceeding has not produced a sufficient record to allow us to decide, as a policy matter, the precise point within the zone of reasonableness at which, for the long term, we would achieve the best possible balance of shareholder and ratepayer interests, the record is sufficient to allow us to determine whether 12% is within that zone of reasonableness. While interest rates cannot be used to calculate just and reasonable rates of return in any simple fashion[82], they do serve as indicators of trends in equity capital costs. The fact that interest rates have been relatively stable over the last three years, for example, indicates to us that the prescribed rate of return which has been in effect for these three years is still within the zone of reasonableness. We find corroboration for this conclusion in the fact that numerous states continue to allow rates of return of around 12%.

46. Accordingly, we find that the current 12% rate of return prescribed for the interstate services of local exchange carriers remains within the zone of reasonableness, and that it would be just and reasonable to retain that rate of return as an interim matter, pending completion of a full represcription proceeding. This interim rate of return prescription will remain in effect until completion of the represcription proceeding. We fully expect that we will prescribe a new rate of return well before the end of 1990. Our provision of interim relief here is designed to remedy a short-term problem only.

47. In order to establish a new prescription as soon as possible that is based upon an adequate record and provides all interested parties with the greatest possible opportunity to present their arguments, we are initiating a full represcription proceeding at this time. This proceeding will be conducted pursuant to the existing Part 65 represcription rules. We are, however, modifying those procedures to require that the carriers file the initial submission on February 16, 1990, instead of January 3, 1990; the remainder of the procedural schedule established in §65.102 of our rules will be adjusted accordingly.[83] We are waiving the requirement that carriers provide the comparable firms information described in §65.400 of the rules. Past experience has demonstrated that such information would not be useful.[84] We also authorize the Bureau to require submission of some additional information.[85]

48. We recognize that such a proceeding will not reflect some of the refinements that are under consideration in the CC Docket 87-463 Rule Making proceeding. Although we may yet determine that some of those refinements may be desirable for any future represcription proceedings, none of the changes proposed in the Notice, apart from the possible development of a new preferred comparable firms methodology, would have a material impact on the end result. We will permit interested persons to present suggested comparable firms methodologies in this represcription proceeding and will give appropriate weight to the results any such methodologies produce.

49. We reject suggestions that any flaws in the existing Part 65 methods or procedures that we will use are so fundamental that it would be inappropriate to conduct a represcription proceeding before we complete the CC Docket 87-463 Rule Making. When we began that Rule Making, it was with the explicit recognition that, while some refinements might be desirable, the Part 65 procedures had worked quite well.[86] When extending the present prescription for a third year in 1988, the Commis-

sion observed: "We would conduct a represcription in spite of . . . [the pendency of the CC Docket 87-463 Rule Making] if we had reason to believe that delaying a represcription would substantially prejudice the interests of consumers."[87] We believe completion of a full represcription by the fall of 1990 will serve the public interest and that a further delay for the sole purpose of considering the possible refinements described in the Notice of Proposed Rule Making in CC Docket 87-463 would not serve the public interest. We are therefore initiating a full represcription proceeding now.

50. Under §1.1206(b)6) of our Rules, rate of return proceedings are non-restricted. Members of the public are advised that, in non-restricted proceedings, *ex parte* presentations are permitted except during the "Sunshine Agenda" period. *See generally* §1.1206 of the Commission's Rules. The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when this Commission (1) releases the text of a decision or Order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever comes first. *See* §1.1202(f) of the Commision's Rules. During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by this Commission or Commission staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* §1.1203 of the Commission's Rules.

51. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding; or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* §1.1202(b) of the Commission's Rules. Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of that presentation to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in the person's previously-filed written comments, memoranda, or filings in this proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and states on its face that the Secretary has been served, and also states by docket number the proceeding to which it relates. *See* §1.1206 of the Commission's Rules.

V. ORDERING CLAUSES

52. Accordingly, IT IS ORDERED, that pursuant to Sections 1, 4(i), 4(j), and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 154(j), and 201-205, that the interim rate of return for the interstate access services of the local exchange carriers IS PRESCRIBED to be at an annual rate of 12.0 percent.

53. IT IS FURTHER ORDERED, that the filing date for initial rate of return submissions in CC Docket No. 89-624 SHALL BE February 16, 1990.

54. IT IS FURTHER ORDERED, that the requirements of §65.400 of the Commission's Rules, 47 C.F.R. §65.400, ARE WAIVED for purposes of the proceedings in CC Docket No 89-624.

55. IT IS FURTHER ORDERED, that this Order IS EFFECTIVE upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties filing comments

Ameritech Operating Companies (Ameritech)

Bell Atlantic telephone companies (Bell Atlantic)

BellSouth Corporation, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company (BellSouth)

Central Telephone Company (Centel)

Cincinnati Bell Telephone Company (CBT)

Consumer Federation of America, International Communications Association, and MCI Telecommunications Corporation (Consumer Coalition)

Contel Corporation (Contel)

General Services Administration (GSA)

GTE Service Corporation (GTE)

National Exchange Carrier Association (NECA)

National Telephone Cooperative Association (NTCA)

NYNEX Telephone Companies (NYNEX)

Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)

Pacific Bell and Nevada Bell (PacTel)

Rochester Telephone Corporation (Rochester)

Southern New England Telephone Company (SNET)

Southwestern Bell Telephone Company (Southwestern Bell)

United States Telephone Association (USTA)

United Telephone System companies (United)

U S West Communications (U S West)

Parties filing replies

Ameritech Operating Companies (Ameritech)

Bell Atlantic telephone companies (Bell Atlantic)

BellSouth Corporation, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company (BellSouth)

Consumer Federation of America, International Communications Association, and MCI Telecommunications Corporation (Consumer Coalition)

General Services Administration (GSA)

GTE Service Corporation (GTE)

National Rural Telecom Association (NRTA)

NYNEX Telephone Companies (NYNEX)

Pacific Bell and Nevada Bell (PacTel)

Rochester Telephone Corporation (Rochester)

Southwestern Bell Telephone Company (Southwestern Bell)

United States Telephone Association (USTA)

United Telephone System companies (United)

U S West Communications (U S West)

Appendix B

Ex Parte and Other Presentations

Date	Party Filing Presentation or Other Submission	Nature of Presentation
06/08/89	United States Telephone Association (USTA)	Oral
07/21/89	USTA	Oral
10/05/89	MCI Telecommunications Corporation (MCI)	Oral
10/30/89	MCI	Oral
11/01/89	MCI	Oral
11/01/89	USTA	Written
11/09/89	MCI	Oral
11/14/89	MCI	Written
11/17/89	Southwestern Bell Telephone Company (SWB)	Oral
11/17/89	USTA	Written
11/20/89	USTA	Written
11/28/89	New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)	Oral
11/29/89	BellSouth Corporation (BellSouth)	Oral
11/30/89	MCI	Oral
12/01/89	MCI	Oral
12/01/89	SWB	Oral
12/01/89	BellSouth	Oral
12/01/89	Bell Atlantic Telephone Companies (Bell Atlantic)	Oral
12/05/89	Bell South	Oral
12/05/89	MCI	Oral
12/06/89	USTA	Oral
12/06/89	BellSouth	Oral
12/06/89	Pacific Telesis	Oral
12/07/89	GTE Service Corporation	Oral
12/07/89	Southern New England Telephone Company (SNET)	Oral
12/07/89	MCI	Written
12/12/89	USTA	Oral
12/12/89	NYNEX	Oral
12/12/89	Bell Atlantic	Oral
12/12/89	MCI	Written

APPENDIX C

Embedded Cost of Debt and Capital Structure -- Bell Operating Companies

Bell Operating Company	Embedded Cost of Debt	Percent of Debt/Equity
Bell Telephone Co. of Pa.	8.34%	41.9 / 58.1
Chesapeake & Potomac Tel. Co.	8.46%	42.4 / 57.6
Chesapeake & Potomac Tel. Co. of MD	9.10%	44.4 / 55.6
Chesapeake & Potomac Tel. Co. of VA	8.36%	39.3 / 60.7
Chesapeake & Potomac Tel. Co. of WV	8.34%	42.8 / 57.2
Diamond State Telephone Co.	9.42%	32.7 / 67.3
Illinois Bell Telephone Co.	7.97%	41.5 / 58.5
Indiana Bell Telephone Co., Inc.	7.62%	35.9 / 64.1
Michigan Bell Telephone Co.	7.97%	41.4 / 58.6
Mountain States Tel. & Tel. Co.	8.65%	42.7 / 57.3
Nevada Bell	9.71%	42.9 / 57.1
New England Tel. & Tel. Co.	8.70%	42.4 / 57.6
New Jersey Bell Telephone Co.	8.00%	37.9 / 62.1
New York Telephone Co.	8.79%	43.4 / 56.6
Northwestern Bell Telephone Co.	9.16%	41.7 / 58.3
Ohio Bell Telephone Co.	8.08%	36.7 / 63.3
Pacific Bell	9.54%	46.4 / 53.6
Pacific Northwest Bell Tel. Co.	8.07%	42.2 / 57.8
South Central Bell Telephone Co.	9.17%	40.5 / 59.5
Southern Bell Tel. & Tel. Co.	8.78%	39.1 / 60.9
Southwestern Bell Telephone Co.	9.21%	43.1 / 56.9
Wisconsin Bell, Inc	7.47%	38.8 / 61.2

Embedded Cost of Debt and Capital Structure -- Bell Regional Holding Cos.

Regional Holding Company	Embedded Cost of Debt	Percent of Debt/Equity
Ameritech	7.94%	38.7 / 61.3
Bell Atlantic	8.46%	39.8 / 60.2
BellSouth	8.94%	38.4 / 61.6
NYNEX	8.48%	40.7 / 59.3
Pacific Telesis	9.34%	43.0 / 57.0
Southwestern Bell	9.28%	42.0 / 58.0
U S West	8.69%	40.5 / 59.5

Source: USTA Comments, Appendix 2

APPENDIX D
STATE COST OF CAPITAL DETERMINATIONS

STATE	DATE	ROR	COMMENTS
Alabama	Nov-86		Rate stabilization plan thru Dec-90, sharing of earnings
Arizona	May-89	11.68%	
Arkansas	Apr-87	11.72%*	
California			Incentive plan begins 1/1/90
Colorado	May-86	11.67%	
Connecticut	Oct-84	12.48%	
Delaware	Aug-88	10.72%	
D.C.	Aug-85	12.29%	
Florida	Oct-88		Incentive plan
Georgia	Sep-85	12.69%	
Idaho			Incentive plan adopted Sep-89
Illinois	Dec-83	12.55%	New incentive plan adopted after pleading cycle closed
Indiana	Dec-85	12.38%*	
Iowa	Feb-89	10.86%	
Kansas	Dec-83	12.18%*	
Kentucky	Sep-88		Incentive plan
Louisiana	Jun-89	10.89%	
Maine	Jun-89		Temporary incentive plan, no change in rates
Maryland			Regulatory reform trial (Sep-88 thru Jun-90), certain services not subject to ROR regulation
Massachusetts	Mar-89	11.24%	
Michigan	Apr-80	12.13%*	
Minnesota	Feb-88	10.64%	
Mississippi	Mar-84	11.99%	
Missouri	Jun-89		Incentive plan begins 1/1/90
Montana	Jul-87	10.94%	
Nebraska	Sep-86	11.35%	
New Hampshire	Jun-85	12.11%	
New Jersey			Trial rate stability plan adopted Jan-89, certain services not subject to ROR regulation
New Mexico	Dec-88	11.76%	
New York	Oct-85	11.85%	Rate moratorium, sharing of earnings

STATE	DATE	ROR	COMMENTS
North Carolina	Nov-84	12.51%	
North Dakota			Recent legislation removed traditional ROR regulation
Ohio	Dec-85	12.22%	
Oklahoma	Jan-86	11.98%	
Oregon	May-89	11.20%	
Pennsylvania	Oct-85	12.38%	
Rhode Island	Aug-89		Incentive plan
South Carolina	Jan-85	12.63%	
South Dakota	Jul-85	11.90%	
Tennessee	Dec-85	12.18%	
Texas	Jun-86	12.03%	
Utah	Oct-89	10.64%	
Vermont	Aug-88		ROR regulation lifted until 1992
Virginia			Experimental plan adopted Dec-88, certain services not subject to ROR regulation
Washington	Apr-87	9.4-10.5%	
West Virginia			Regulatory reform trial (Apr-88 thru Dec-90), certain services not subject to ROR regulation
Wisconsin	Jul-89	11.58%	
Wyoming	Jan-85	11.91%	

* Adjusted to reflect comparability with FCC treatment.

APPENDIX E

Other Cost of Equity Proposals

Submitting Party	Estimated Equity Cost	Methodology
U S West	14.88%	Capital Asset Pricing Model
NYNEX	15-16%	Analysis of Standard and Poors Composite Returns
NYNEX	14.77%	Analysis of 32 Firms Included in CC Docket 84-800 Comparable Firms Study
GSA	11.6%	Analysis of Yields on BB-Rated - Corporate Bonds
GSA	12.0%	Analysis of Earned Returns of Group of Large Corporations

APPENDIX F

Schedule of pleadings in CC Docket No. 89-624

February 2, 1990	Notices of appearance
February 16, 1990	Initial carrier submissions
March 23, 1990	Responsive submissions
April 13, 1990	Carrier rebuttal submissions
June 8, 1990	Proposed findings and conclusions
June 22, 1990	Reply findings and conclusions

FOOTNOTES

[1] 47 C.F.R. §§ 65.1 *et seq.*

[2] *Authorized Rates of Return for the Interstate Services of AT & T Communications and Exchange Telephone Companies*, 51 Fed. Reg. 1796 (January 15, 1986), *modified on recon.* 104 FCC 2d 1404 (1986).

[3] *Authorized Rates of Return for the Interstate Services of AT & T Communications and Exchange Telephone Companies*, 51 Fed. Reg. 32920 (September 17, 1986), *recon. denied* 2 FCC Rcd 5636 (1987).

[4] *See id.* at ¶¶ 49, 52, 89; *see also* 47 C.F.R. §§ 65.102(c).

[5] *Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT & T Communications and Local Exchange Carriers*, 2 FCC Rcd 6491 (1987).

[6] *Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT & T Communications and Local Exchange Carriers*, 3 FCC Rcd 1697 (1988) (*Deferral Order*). Under §65.102 of the Commission's Rules, 47 CFR §65.102, initial carrier rate of return submissions had been due January 3, 1989. The Commission had previously extended that filing date to February 29, 1989. Southwestern Bell Telephone Company, et al., Petitions for Waiver of Section 65.102, 2 FCC Rcd 7313, 7315 (1987). The *Deferral Order* was adopted February 25, 1988.

[7] *Id.* at 1688 (citations omitted).

[8] *Id.* at 1698.

[9] *See Public Notice*, DA 88-1604, released October 17, 1988, 4 FCC Rcd 1303 (1989). Comments supporting the petitions were filed by several LECs, AT&T, and the United States Telephone Association. The BellSouth petition was opposed by Telus Communications, an interexchange carrier offering service in several Florida cities.

[10] *Deferral of Rate of Return Represcription Filings Pursuant to Section 65. 102 (c) of the Rules*, AAD 8-1930, 3 FCC Rcd 7220 (1988).

[11] *See Policy and Rules Concerning Rates for Dominant Carriers*, 4 FCC Rcd 2873 (1989).

[12] *Deferral of Rate of Return Represcription Filings Pursuant to Section 65. 102 (c)*, AAD 8-1930, 4 FCC Rcd 3920 (1989).

[13] 4 FCC Rcd at 3921 n.13 (citation omitted).

[14] Public Notice, 4 FCC Rcd 7051 (1989) (released September 21, 1989).

[15] *Id* at 2-3.

[16] A complete list of parties filing comments and replies appears in Appendix A. A list of *ex parte* presentations and other submissions outside of the established pleading cycle, which are permissible under our rules, appears in Appendix B.

[17] The LECs do argue that the Commission should ignore the State cost of capital data that they have provided. *But see* ¶ 45, below.

[18] USTA Comments at 4.

[19] OPASTCO Comments at 2.

[20] *E.g.*, USTA Comments at 4; Centel Comments at 3.

[21] Contel Comments at 2.

[22] BellSouth Comments at 11.

[23] PacTel Comments at 10.

[24] NECA Comments at 6.

[25] BellSouth Comments at 8-10; Ameritech Comments at 4; US West Comments at 3; US West Reply at 4-6.

[26] *E.g.*, U S West Reply at 6 n.19, and references therein.

[27] Ameritech Reply at 11-14. Ameritech argues that, even in a Rule Making proceeding under §553 of the Administrative Procedures Act, oral argument and cross examination of witnesses may be required, particularly in rate proceedings. *Id* at 12. Ameritech cites *Action for Children's Television v. FCC*, 564 F. 2d 458, 470 n.19, (D.C. Cir. 1973) and *Mobil Oil Corp. v. FPC*, 483 F. 2d 1238 (D.C. Cir. 1973). Ameritech does not explain how its argument is consistent with the Supreme Court's rulings in *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*, 435 U.S. 224, 241, 543 (1978).

[28] U S West Comments at 2-4; Ameritech Reply at 8-12. In conjunction with the argument that the Commission cannot legally change the rate of return until it both revises the Part 65 rules and conducts a proceeding under those rules, both US West and Ameritech state that they reserve the right to challenge the current rate of return in a tariff proceeding. US West Comments at 4; Ameritech Comments at 14-16, *citing Jersey Central Power and Light Co. v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987) (*en banc*). *See also* LEC industry delegation *ex parte filing*, submitted November 29, 1989.

[29] Consumer Coalition Reply at 28.

[30] *Id.* at 29. Consumer Coalition cites *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944)("Under the statutory standard of "just and reasonable" it is the result reached not the method employed that is controlling . . . . The fact that the method employed to reach that result may contain infirmities is not that important.").

[31] *Id.* at 30.

[32] *Id.* at 34, *citing AT&T v. FCC*, 572 F. 2d 17, 22-23 (D.C. Cir.), *cert. denied*, 439 U.S. 875 (1978) and *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 245 (1973).

[33] *Id.* at 30-32. Consumer Coalition notes in this regard that, while Part 65 contains data filing requirements geared to particular methodologies, §65.102(a) specifically permits carriers to make other kinds of showings and does not limit the types of relevant evidence that the Commission may consider in making a prescription. *See also* December 7 *ex parte* submission of Consumer Coalition.

[34] Ameritech Comments at 2, 5-6; Bell Atlantic Comments at 1; BellSouth Comments at 5; Centel Comments at 4; GTE Comments at 3; NYNEX Comments at 6-8; PacTel Comments at 5-9; SNET Comments at 1-2; U S West Comments at 9.

[35] Consumer Coalition Reply at 4-5.

[36] NYNEX Comments at 22-27; NYNEX Reply at 30-33.

[37] Ameritech Reply at 17-19.

[38] U S West Reply at 6-9.

[39] Consumer Coalition Comments at 12.

[40] Consumer Coalition Reply at 16-19.

[41] *Id.* at 19-22.

[42] U S West Reply at 9-12.

[43] NYNEX Comments at 18-22.

[44] NYNEX Reply, Attachment E, Statement of William H. Davidson.

[45] SNET Comments at 2; SNET Reply at 3.

[46] Consumer Coalition Reply at 15-16.

[47] USTA Comments, Attachment 1, p.i-v. At the request of Common Carrier Bureau staff, USTA submitted the names of the cluster firms: Air Products and Chemicals, American Cyanimid, Anheuser-Busch, Boise Cascade, Campbell Soup Co., Champion International, Coca-Cola Co., CPC International, General Mills, Georgia-Pacific, Johnson & Johnson, Kimberly-Clark Corp., Lockheed Corp., Monsanto, PPG Industries, Inc.,

Sara Lee Corp., Squibb Corp., Times Mirror, Warner-Lambert, and Westvaco Corp. USTA *ex parte* submission, November 1, 1989.

[48] The discounted cash flow method adapts the formula for computing the present value of a stream of cash flows to estimate the return required to induce an investor to buy and hold a share of common stock at the current price. In its simplest form the formula is written as follows:

Cost of Equity = Dividend/Price + Growth

USTA used a three month (July, August, and September) average of daily closing prices for the Price factor, the September IBES consensus growth forecast for the Growth factor, and the current dividend for the Dividend factor. USTA Comments, Appendix 1, p.viii.

[49] The capital asset pricing model (CAPM) assumes that the expected rate of return required to induce an investor to buy and hold a stock is proportional to the perceived degree of market risk the investor is assuming by making the purchase. The CAPM formula relating risk and return is:

Cost of equity = RF + (beta * RP)

where RF is the rate of return an investor can obtain from a virtually risk-free investment, RP is the risk premium over the risk free rate that an investor can obtain by holding a fully diversified portfolio of common stocks, and beta is a measure of the riskiness of the stock being examined relative to the riskiness of the diversified portfolio.

[50] The "comparable earnings" approach posits that the regulated company's cost of capital should be set equal to the actual returns on book equity earned in the recent past by nonregulated firms of comparable risk. USTA used the 1985-88 actual realized return on book equity for the 20 cluster firms.

[51] USTA Comments, Appendix 1, p.v.

[52] USTA Comments at 7.

[53] Beta is a measurement of the riskiness of a stock relative to the riskiness of a fully diversified portfolio of stocks.

[54] Consumer Coalition Reply at 10-12.

[55] *Id.* at 6 & Statement of Richard J. Lurito at 3.

[56] Consumer Coalition Reply at 6-8.

[57] Consumer Coalition Comments, Statement of Richard J. Lurito, p.5.

[58] Consumer Coalition Comments, Statement of Richard J. Lurito, at 10-25.

[59] USTA Comments at 7.

[60] NYNEX Reply, p.17, Statement of Willard T. Carleton, pp.7-9, 16-17.

[61] *Id.*

[62] NYNEX Reply, Statement of Robert B. Morris.

[63] BellSouth Reply, p.13; USTA Comments, Appendix 1, p.iii.

[64] Consumer Coalition Reply, Statement of Richard J. Lurito, p.5.

[65] Ameritech Reply, pp.35-39, Statement of Charles M. Linke, pp.11-13; Bell Atlantic Reply, pp.5-6, Statement of James H. Vander Weide, p.5; BellSouth Reply, p.13-17; NYNEX Reply, p.19, Statement of Willard T. Carleton, pp.7-16; Southwestern Bell Reply, pp.11-15; and U S West Reply, pp.16-18, Statement of Laurence B. Siegel, pp.19-22.

[66] Ameritech Comments, Appendix B, p.B-5; Ameritech Reply, p.39.

[67] Consumer Coalition Reply, Statement of Richard J. Lurito, p.15.

[68] *Bluefield Water Works v. PSC*, 262 U.S. 679 (1923); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[69] *E.g., FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942); *see also Duquesne Light Co. v. Barasch*, 109 S.Ct. 609, 615-618 (1989).

[70] *See Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1504-1511 (1984).

[71] *Hope* at 603. The Supreme Court has equated the low end of the statutory standard requiring "just and reasonable rates" with the Constitutional prohibition on confiscatory rates. *FPC v. Natural Gas Pipeline Co.*, 315 US at 586.

[72] *FPC v. Natural Gas Pipeline Co*, 315 U.S. 575, 585 (1942); *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968).

[73] *Permian Basin Area Rate Cases*, 390 U.S. at 790, *quoted in U.S. v. FCC*, 707 F. 2d 610, 618 (D.C. Cir. 1983).

[74] *U.S v. FCC*, 707 F. 2d at 618 *and cases cited therein.*

[75] *Id.*

[76] *Cf. Jersey Central Power and Light Co. v. FERC*, 810 F. 2d 1168, 1186 (D.C. Cir. 1987)(*en banc*).

[77] In accordance with this decision, we waive, for purposes of this interim prescription, those portions of Part 65 that require more extensive proceedings prior to a prescription.

[78] We know that risk due to uneconomic bypass has dramatically decreased since 1986. However, we cannot determine at this time, based on the record before us, whether the decreased risk of uneconomic bypass has been counterbalanced by an increase in other forms of competition.

[79] The most pronounced trend in the state cost of capital data, though, is the trend towards incentive regulation. Twice as many states have adopted some variation on incentive regulation in the past two years as have made traditional rate of return prescriptions.

[80] *See, e.g., American Telephone and Telegraph Co. Charges for Interstate Telephone Service*, 51 FCC 2d (1975), *recon. denied*, 53 FCC 2d 1073 (1975); 57 FCC 2d 960 (1976). In the instant proceeding, the showings of the carriers demonstrate that there has been virtually no change in the embedded cost of debt of the RHCs, and only a small change in the average capital structure of the RHCs. *See* Appendices C and D. Consumer Coalition and GSA argue that the Commission should impute a layer of preferred stock into the average RHC capital structure. Consumer Coalition Comments at 15-16; GSA Reply, Appendix. Imputation of a hypothetical capital structure would clearly be inappropriate in an interim proceeding.

[81] *See id. See also American Telephone and Telegraph Company and the Bell System Operating Telephone Companies, Charges for Interstate Service*, 78 FCC 2d 661, 666-670 (1980).

[82] *See Authorized Rates of Return*, 51 Fed. Reg. 32920, ¶¶ 34-35.

[83] The schedule for the represcription proceeding is contained in Appendix F.

[84] *Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers*, CC Docket 87-463, Notice of Proposed Rule Making, 2 FCC Rcd 6491, 6493 (1987).

[85] Section 65.102(a) states that the Chief, Common Carrier Bureau, "may require from carriers providing interstate services, and from other participants submitting rate of return submissions, data or studies that are reasonably calculated to lead to a full and fair record." 47 CFR §65.102(a).

[86] 2 FCC Rcd 6491, 6496.

[87] *Deferral Order*, 3 FCC Rcd at 1698.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 20, 1989

Released: December 28, 1989

Donald W. Cuthrell, Jr.
Managing Partner/General Manager
Richmond Radio Limited Partnership
P.O. Box 180
Williamsburg, VA 23187

Re: WQSF-FM
Williamsburg, VA

Dear Mr. Cuthrell:

This refers to your pending application for renewal of the license of Station WQSF-FM, Williamsburg, Virginia (File No. BRH-880531ZF). Review of the station's equal employment opportunity (EEO) record from April 1985, the date that you acquired the license, to May 31, 1988, the date that you filed your renewal application, reflects a failure to comply with the Commission's equal employment opportunity rules.

Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and that it establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee.

When the renewal application indicates an absence of evidence of discrimination and an adequate record of EEO efforts, it is granted, if otherwise appropriate. When the application indicates an inadequate record of EEO efforts, *see* Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b) and (c), the Commission may impose a variety of sanctions or remedies, such as reporting conditions, the submission of a modified EEO program, renewal for less than a full term, forfeiture or a combination thereof. Further, if substantial and material questions of fact exist or if we otherwise cannot find that a grant of the application would be consistent with the public interest, we designate the application for hearing. 47 U.S.C. Sec. 309 (d)(2); *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending; See* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Bilingual - Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978).

Our review of your renewal application and the supplemental information reveals no evidence of discrimination but does reveal a record of inadequate EEO efforts. During the license term, you had 44 full-time hiring opportunities, all of which were upper-level positions.[1] Prior to March 1988, you appear to have contacted a number of recruitment sources for 32 of those positions, although only one was a minority source, The Afro-American Newspaper.[2] In March 1988, two months before you filed the instant renewal application, you expanded your recruitment sources, including the addition of minority organizations. [3] Moreover, you did not interview minority applicants 39 of the 44 full-time positions.[4] Blacks were selected for five of the 44 positions. Your EEO Program Report indicates that you received no minority referrals from the organizations you contacted and only two minority referrals from media advertisements during the 12 months preceding the filing of your renewal application.[5]

In view of the foregoing, we conclude that from April 1985 (date acquired) to May 31, 1988, you did not have an effective EEO program or engage in ongoing self-assessment of your EEO efforts. Thus, there were repeated and continuing failures to comply with the Commission's affirmative action provisions set forth in Sections 73.2080 (b)(5) and 73.2080 (c)(2) and (5) of the Commission's Rules, 47 C.F.R. Section 73.2080 (b)(5) and 73.2080 (c)(2) and (c)(5).

Based upon our review of your record and the pertinent case precedent in this area, we conclude that the renewal application for station WQSF-FM should be granted for a full term, subject to reporting conditions for three years and a Notice of Apparent Liability for Forfeiture of $2,000. WQSF's record appears to be less egregious than either *WROV Broadcasters, Inc.*, 4 FCC Rcd. 6157 (1989) (*WROV*), in which we granted the renewal subject to reporting conditions and issued an NAL in the amount of $5,000, or *Beasley Broadcast Group*, 4 FCC Rcd 5214 (1989) (*WLIT / WYAV - FM*), in which we granted the renewal subject to reporting conditions and issued an NAL in the amount of $3000. In *WROV*, the licensee affirmatively recruited minority applicants for only seven of the 65 full-time positions and only two of the 42 upper-level positions filled during the license term. The licensee in *WROV* made little effort to recruit minorities for upper-level positions. Moreover, WROV hired no Blacks into upper-level positions. In *WLIT / WYAV - FM*, the station maintained little documentation of their recruitment efforts and reported that they affirmatively used minority sources for recruitment for only 16 of the 36 full-time positions during the license term. Moreover, it appeared in *WLIT / WYAV - FM* that minority applicants were considered for only one out of 16 overall full-time positions. Only three minorities were hired in filling 36 positions at the station, but these minorities were all hired at renewal time.

Although you reported that, prior to the filing of your renewal application, you recruited from only one minority source, you nevertheless actively recruited minority applicants from that one minority source and from other sources for 32 of the 44 full-time vacancies during the license term. Further, in filling these 44 full-time vacancies, you interviewed and hired minorities for five of

these positions. Unlike the hires in *WROV*, these five positions were all upper-level positions and, unlike *WLIT/WYAV - FM*, were filled throughout the license term. Thus, while your record of employing and hiring of Blacks at WQSF-FM is similar to that of stations WLIT/WYAV-FM and WROV, and although the percentage of minorities in the Williamsburg labor force is higher than at the other two stations, you appear to have more consistently recruited and considered Black applicants. Therefore, we believe that a $2000 forfeiture is appropriate.

Accordingly, IT IS ORDERED, that the application of Richmond Radio Limited Partnership for renewal of license of Station WQSF-FM IS GRANTED, subject to the reporting conditions specified herein.

IT IS FURTHER ORDERED, that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, Richmond Radio Limited Partnership is hereby advised of its apparent liability for forfeiture of $2,000 for its repeated failures to comply with Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, in the manner described above.[6]

IT IS FURTHER ORDERED, that the licensee of Station WQSF-FM, Keymarket of Virginia, Inc., submit an original and one copy of the following information on June 1, 1990, June 1, 1991 and June 1, 1992:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[7]

(b) a list of employees as of the May 1, 1990 payroll period for the first report and as of the May 1, 1991 and May 1, 1992 payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin; and

(c) details concerning the station's efforts to recruit minorities for each position filled during the 12 month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

In addition, you may submit any information you believe relevant with regard to the station's EEO performance and your efforts thereunder. The reports are to be filed with the Secretary of the Commission to the attention of the Mass Bureau's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment reports, you may call the Mass Media Bureau's EEO Branch (202) 632-7069. In regard to the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this letter.

Any comments relating to your ability to pay should include those financial items set forth in the noted attachment.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We also note that your classification of the 44 full-time positions filled during during the license term appears questionable. You report that all of these employees were hired into positions in the upper-four categories, and nine of these employees were hired as Officials and Managers. However, the job descriptions submitted for Office Manager and Business/Traffic Manager positions do not support their classification. Although we do not find your original classifications so unreasonable as to raise a question of intentional misclassification, *see Metrogeneral Communications of Nashville, Inc.*, 99 FCC 2d 256, 261-62 (1984), we admonish you to focus on an employee's job duties, not job title, when making classification decisions.

[2] In response to a further Commission inquiry, you indicated that you have no information concerning the number of minority referrals, if any, you received during the license term prior to the 12 months preceding your renewal application.

[3] Those sources are: J. Sargeant Reynolds Community College; John Tyler Community College; National Association of Broadcasters Employment Clearinghouse; N.A.A.C.P. (Richmond and Williamsburg branches); Handicaps Unlimited of the Williamsburg Area; Capital Area Training Consortium; Virginia Union University; Virginia State University; and American Women in Radio and Television Newsletter.

[4] You also indicated in your response to our inquiry that you have no further information concerning the racial composition of applicants for the 44 full-time positions beyond the information you provided for applicants interviewed.

[5] The available labor force for the Norfolk-Virginia Beach-Newport News, Virginia Metropolitan Statistical Area, which includes Williamsburg, Virginia, is 28.5% minority (26.0% Black, 1.2% Hispanic, 1.3 other). In 1987, you had only one Black employee on your upper-level full-time staff of 15 (6.7%) and one out of 17 (5.9%) on your overall full-time staff. In 1988, you had only one Black employee on your overall full-time staff of 19 (5.2%).

[6] We are mindful of the recent conditional assignment of the license of WQSF-FM from Richmond Limited Partnership to Keymarket of Virginia, Inc. We intend that the forfeiture be assessed on the assignor; the reporting conditions pass automatically to the assignee. *Woolfson Broadcasting Corporation*, 4 FCC Rcd. 6160 (1989).

[7] Such a list might start:

(1) News Director; Officials and Managers; Full-time

3 Applicants:	1 white female	A.W.R.T.
	1 black male	Urban League
	1 black female	NAACP

Sources contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP

Selected: black male (03/15/91).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-306

In re Applications of

HENRY R. MALLOY, JR. d/b/a REM MALLOY BROADCASTING	File No. BPH-860627MH
PEEBLES BROADCASTING COMPANY	File No. BPH-860603ME
JAMES S. LEE and DONALD L. BAKER d/b/a INTERACTIVE MEDIA	File No. BPH-860707MS
FREE AIR CORPORATION	File No. BPH-860707NH
CLEAR CHANNEL COMMUNICATIONS, INC.	File No. BPH-860707NV
BERNARD DAWSON	File No. BPH-860707NW

For Construction Permit for a
New FM Station on Channel 275A
Raleigh, North Carolina

ORDER

Adopted: January 4, 1990; Released: January 12, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. On July 27, 1989, the Commission in *Special Markets Media, Inc.*, 4 FCC Rcd 5753 (1989) reinstated certain applications for further consideration by the Mass Media Bureau. Pursuant to that Commission action, the Bureau has now designated for hearing the application of Special Markets Media, Inc. and consolidated it with the Raleigh proceeding, which is now pending before the Board. *Hearing Designation Order*, DA 89-1495, released December 27, 1989. In *Special Markets, supra*, 4 FCC Rcd at 5753, and note 5, the Commission indicated that the Bureau's subsequent designation orders would require, where pertinent, the Review Board to remand pending cases for further action by the presiding Administrative Law Judges. This is so because the Special Markets Media application is mutually exclusive with the other pending applications in the Raleigh proceeding, requiring a consolidated comparative hearing. *See Special Markets Media, Inc., supra*, at 5753, para. 5; and *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

2. ACCORDINGLY, IT IS ORDERED, That the record in this proceeding IS REOPENED, and that the case IS REMANDED to the Administrative Law Judge (ALJ) for further action consistent with *Special Markets Media, Inc.*, 4 FCC Rcd 5753 (1989), and the *Hearing Designation Order*, DA 89-1495, released December 27, 1989; and

3. IT IS FURTHER ORDERED, That the Suggestion for Vacation of Initial Decision filed December 7, 1989, by Interactive Media, and the Motion to Vacate Initial Decision filed December 14, 1989 by Special Markets Media, Inc. ARE DISMISSED as moot; and that the Petition to Reopen the Record and for Leave to Amend filed December 4, 1989 by Peebles Broadcasting Company, and the Petition for Leave to Amend filed December 18, 1989 by Clear Channel Communications, Inc. ARE REFERRED to the presiding ALJ for further consideration.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI Telecommunications Corporation,
Complainant,

v. File No. E-88-44

Pacific Northwest Bell Telephone
Company,
Defendant;

MCI Telecommunications Corporation
Complainant,

v. File No. E-88-46

Pacific Bell Telephone Company,
Defendant;

MCI Telecommunications Corporation
Complainant,

v. File No. E-88-47

Southwestern Bell Telephone Company,
Defendant;

MCI Telecommunications Corporation,
Complainant,

v. File No. E-88-48

Wisconsin Bell, Inc.
Defendant;

MCI Telecommunications Corporation,
Complainant,

v. File No. E-88-49

The Chesapeake & Potomac Telephone
Companies,
Defendants;

MCI Telecommunications Corporation,
Complainant,

v. File No. E-88-50

New Jersey Bell Telephone Company,
Defendant;

MCI Telecommunications Corporation,
Complainant,

v. File No. E-88-51

Mountain States Telephone & Telegraph
Company,
Defendant;

MCI Telecommunications Corporation,
Complainant,

v. File No. E-88-52

Michigan Bell Telephone Company,
Defendant;

MCI Telecommunications Corporation,
Complainant,

v. File No. E-88-54

Northwestern Bell Telephone Company,
Defendant;

and

MCI Telecommunications Corporation,
Complainant,

v. File No. E-88-55

The Diamond State Telephone Company,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1989; Released: January 9, 1990

By the Commission:

I. INTRODUCTION

1. The primary question presented in these consolidated proceedings is whether a complainant/customer has a right under the Communications Act to recover damages if the complainant can establish that a carrier from whom it has purchased service has violated a valid rate of return prescription. We answer that question in the affirmative.

2. Complainant MCI alleges that the above-noted defendants earned in excess of the rate of return prescribed by the Commission for the period from October 1, 1985 through December 31, 1986; thus, MCI contends, the defendants' rates were in violation of the prescription order and were unjust and unreasonable. MCI claims it took interstate access service during this period from the defendants, paid the tariffed charges for such service, was damaged as a result, and, therefore, is entitled to reparations. We conclude that MCI has met its burden of estab-

lishing that the defendants violated the Act and are liable to MCI to the extent it can establish that it was damaged as a result of these violations.

3. We begin with an account of the applicable statutory scheme and a brief overview of certain Commission orders and court decisions that preceded the filing of MCI's complaints.

II. BACKGROUND

4. The Communications Act of 1934 (the Act) grants the Commission a mandate to regulate "so as to make available . . . efficient, Nation-wide, . . . communications service, with adequate facilities at reasonable charges...."[1] Title II of the Act requires that carriers' rates for communications services must be just, reasonable, and non-discriminatory.[2]

5. The Act provides the Commission with various tools to fulfill its regulatory functions. Some of these tools give us the means to affect rates indirectly, such as by prescribing a carrier's accounting system and depreciation rates, [3] or controlling its entry into or exit from the interstate market.[4] Other provisions of the Act are connected more directly with the ratemaking process. Section 203 authorizes us to determine the information that must accompany a carrier's tariff filings, while Section 204 empowers us to investigate the lawfulness of proposed rates and, pending hearing, suspend the effectiveness of those rates for up to five months.[5] Section 205 of the Act also grants us the authority, after a full opportunity for hearing, "to determine and prescribe" just and reasonable rates or practices "to be thereafter observed."[6]

6. The statute provides the Commission broad authority to effectuate its provisions and to penalize those who violate them. Section 4(i) states that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of its functions."[7] Title V contains provisions authorizing the levying of fines and forfeitures.[8]

7. The Act also expressly provides private parties a right to file a complaint against carriers and obtain reparations if the party can establish that a carrier has violated the Act and the party has been damaged as a result of such violation. Specifically, the Act states that "any person" may petition the Commission in complaint of "anything done or omitted to be done" by any carrier in contravention of the Act, and that carriers shall be liable "for the full amount of damages sustained in consequence of any such violation." The Commission has a duty to investigate a complaint "in such manner and by such means as it shall deem proper." If the Commission finds that the complainant is entitled to an award of damages, the Commission has authority to order the carrier to pay the complaining party the sum to which it is entitled.[9]

8. In 1972, the Commission, in an effort to carry out its responsibilities in a more effective and expeditious manner, asserted the authority to prescribe the rate of return a carrier may earn. That authority was upheld in 1975 by the U.S. Court of Appeals for the District of Columbia Circuit and has not been questioned elsewhere.[10]

9. Prior to 1984, the Commission exercised this authority to prescribe a rate of return for a single entity: the Bell System.[11] As a result of the telecommunications industry's structure at that time, the regulatory effect of this single prescription rippled throughout the industry as a whole.[12] The subsequent Bell System divestiture and the concurrent development of the access charge system altered the industry's structure fundamentally,[13] and created the prospect of having to prescribe a rate of return not just for a single entity, but for all eight entities that emerged after divestiture (*i.e.*, AT&T and the seven Regional Bell Holding Companies) and approximately 1400 other local exchange carriers as well.

10. Faced with this prospect, the Commission adopted, in a broad Rule Making proceeding: (1) methodologies to be used to prescribe maximum rates of return for AT&T and local exchange carriers; (2) procedures for represcribing rates of return on a regular basis; (3) a system of monitoring carriers' earnings; and (4) a requirement that overearnings be refunded, either directly to those who had paid rates that produced the overearnings, or pursuant to automatic, prospective adjustments to tariff rates.[14] In keeping with its traditional approach to prescribing rates of return, the Commission established both an authorized return and a "spread" or "buffer" above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return "to determine whether a rate of return prescription has been violated."[15] The Commission also defined particular time periods for measuring compliance with the prescribed return. Consistent with its traditional practice, the Commission did not prescribe a minimum rate of return.[16]

11. The Commission determined that it would review earnings on an overall basis, and on three categories of access charge rate elements: special, common line, and switched traffic sensitive. The Commission acknowledged that reviewing earnings in this manner might require a carrier to refund excessive earnings in one category even though its overall return was not excessive. The Commission determined, however, that such a review would not be unfair to carriers because of the safeguards built into its plan. These safeguards included a long evaluation period, the aggregation of access elements into three categories, the freedom afforded carriers to select the geographic level at which their rates would be tariffed, and the creation of the "spread" or "buffer" above the authorized return. The Commission noted that each of these safeguards would provide carriers flexibility to offset earnings "peaks" and "valleys," and thereby provide them a reasonable opportunity to achieve their allowed return.[17]

12. Reviewing earnings on a categorical basis also furthered the public interest, the Commission determined, by helping to prevent discrimination among the users of access services.[18] The Commission stated:

> Our obligation is to provide carriers a reasonable opportunity to achieve their authorized return. That opportunity, however, is not unlimited; we are bound by the Communications Act to ensure that rates are just and reasonable, and do not produce unreasonable discrimination or undue preferences. [Reviewing earnings on a categorical basis helps] to accomplish that goal by not allowing a carrier to offset excessive rates to one customer with deficient

rates to another. A carrier is still afforded the opportunity to achieve its overall return, it simply must do so in a non-discriminatory manner.[19]

13. During the 15 month time period at issue in the instant complaints, local exchange carriers, including the defendants, were required to file rates calculated to earn a 12.75 percent return.[20] Because the initial review period would be 15 months, rather than two years, as would be followed thereafter, the Commission expanded the "buffer" that would be used during this initial period to determine whether the prescription had been violated.[21] Thus, carriers were given notice that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate earnings during this period and 13.25 percent would be the maximum allowable rate of return for any access service category.[22]

14. In January 1988, the U.S. Court of Appeals for the District of Columbia Circuit set aside the automatic refund mechanism as arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce."[23] The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription."[24]

15. Against this background, we turn to the pleadings of the parties.

III. PLEADINGS OF THE PARTIES

16. In February 1988, MCI Telecommunications Corporation (MCI) filed ten formal complaints[25] against the defendant local exchange carriers.[26] MCI alleges that the rates it paid for certain of the defendants' interstate access services during the period from October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Act. 47 U.S.C. § 201(b). MCI supported its allegations with evidence in the form of reports filed with this Commission by the defendants for the 15 month period at issue which show that the defendants achieved earnings in excess of this Commission's prescribed rate of return on one or more of the three interstate access service categories established for purposes of enforcing that prescription.[27]

17. Pursuant to Sections 206 through 209 of the Act, MCI requests that this Commission declare the defendants' charges for the period from October 1, 1985 through December 31, 1986 to be in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendants to pay damages to MCI equal to the difference between the amount it actually paid for interstate access service during that period and the amount it would have paid if the charges had earned no more than the maximum allowable rate of return, plus interest on this amount from January 1, 1987 at the rate specified by this Commission in the Docket 84-800 proceeding. At the time MCI filed its complaints, it stated that the precise amount of damages it suffered could not be determined, and it alleged a right under Section 1.723(b) of the Rules to file a supplemental complaint on which damages may be awarded.[28]

18. All of the defendants filed answers and motions to dismiss the complaints. Mountain States, NWB and PNB (referred to collectively herein as "US West" or the "US West carriers") jointly filed an answer and motion to dismiss in which they claim that MCI has not stated a cause of action upon which relief may be granted. The US West carriers admit they filed monitoring reports and admit to the specific recitations of the earned interstate rates of return cited by MCI, but also state that they underearned as to specific access elements. They further contend that the earned rate of return on a particular element does not establish the justness or reasonableness of the underlying rate. The US West carriers allege that MCI's claim for damages is nothing more than a claim for automatic refunds, the same as that invalidated by the Court of Appeals for the District of Columbia in *AT & T v. FCC*. They argue that neither *New England Telephone* nor *AT & T v. FCC* stands for the proposition that exceeding a rate of return provides a carrier with a cause of action for damages. Finally, the US West carriers state that a portion of the claim is barred by the statute of limitations, 47 U.S.C. § 415. To the extent that the Commission upholds MCI's complaint, defendants claim in a contingent cross complaint that they are entitled to sums for those access elements on which they underearned.

19. In its answer and motion to dismiss, Pacific Bell denies that its rates were unlawful and denies that MCI was damaged. Pacific Bell claims that to award MCI the damages it seeks would violate the Act because MCI would be paying less than Pacific Bell's tariffed rate. It further contends that Docket 84-800 did not establish a private cause of action that would permit individual remedy and that it would be premature to consider an individual complaint for alleged damages because of the court remand in *AT & T v. FCC*. Pacific Bell argues that part of the claim is barred by the statute of limitations and that, for a portion of the period, the rates charged were not unlawful because it earned less than the authorized rate of return.

20. SWB also argues that MCI has failed to state a cause of action. It argues that the complaint is based on the automatic refund rule that was invalidated in *AT & T v. FCC* and that it is barred, in part, by the statute of limitations. SWB contends that MCI alleges only that SWB realized returns for particular categories of interstate access service in particular states but does not allege that SWB overearned overall and, therefore, that MCI's complaint should be dismissed.

21. Wisconsin Bell's and Michigan Bell's answers and motions to dismiss were identical in their essentials. They admit that the Commission prescribed a maximum overall return but deny that the Commission's "prescription" for access categories has any lawful effect. To the extent the claim is for special access, Wisconsin Bell states that MCI only paid a portion of the special access tariff rate. They deny that they "actually earned" the amount recited in the monitoring reports because, they contend, the methodology they used to compute their reported earnings overstates the return on interstate switched access. Wisconsin Bell and Michigan Bell argue that the rates were not carrier-initiated and that, in any event, damages in this case could only be awarded prospectively from the date the complaint was filed. They argue further that the claim is barred by the statute of limitations. The defendants also contend that if any damages were suffered, it was by MCI's customers, not MCI, and thus any refunds must be flowed-through to those customers.

22. C&P, New Jersey Bell and Diamond State filed a consolidated answer and motion to dismiss. They argue that the complaint fails to state a cause of action because MCI alleges only that the defendants reported

overearnings in access categories and not overall. The contend that *AT & T v. FCC* bars MCI's claim and, therefore, it should be dismissed.

23. MCI filed replies to the answers and oppositions to the motions to dismiss. In response to the defendants' contention that the complaints are legally deficient because MCI fails to demonstrate that the tariffed charges paid by MCI were unjust and unreasonable, MCI contends that the effort by the defendants to divorce the earned rate of return from the lawfulness of the carriers' rates ignores the history and purpose of rate of return regulation. MCI further states that the court in *AT&T v. FCC* invalidated the Commission's automatic refund scheme, but left undisturbed the Commission's authority to establish an allowable maximum rate of return on interstate access. MCI also disagrees with the defendants' claims that the complaints are barred by the statute of limitations, arguing that the cause of action accrues when information that the actual return exceeded the authorized rate became publicly available, in this case with the filing of the monitoring reports on September 30, 1987. It also claims that the defendants' contingent cross complaints are unauthorized and should be stricken from the record.

24. On July 27, 1989, the Common Carrier Bureau (Bureau) issued "Orders to Show Cause" to each of the defendants directing them to show cause why the Commission should not order the payment of damages sought by the complainant.[29] The Bureau found defendants' reliance on *AT & T v. FCC* in their answers and motions to dismiss to be unfounded, stating that the court in that case did not discuss Section 208 complaint proceedings, nor did it alter the statutory scheme of the Communications Act or limit the remedies Congress established therein. The Bureau noted that the Communications Act provided MCI the right to file its complaints, that the defendants' own filings showed they had violated this Commission's rate of return prescription, and that this was enough to make out a *prima facie* case of a Communications Act violation sufficient to support a Section 208 complaint. The Bureau also stated that, although the record at that time arguably provided a legally adequate basis to support Commission action, it would provide the defendants an additional opportunity to show cause why this Commission should not order the payment of damages sought by MCI.

25. The Bureau's order also noted that the decision in *AT & T v. FCC* could be read to indicate that this Commission's automatic refund mechanism might have survived challenge if it had provided a means for taking into account the impact of a refund obligation on a carrier's overall rate of return. The Bureau stated that if a defendant elected to argue that this Commission should consider the impact on the defendant's overall return that would result from an award of damages, it should include in its response to the order to show cause a precise accounting of that impact. The Bureau also directed the defendants to provide a calculation of damages for each service and/or service segment as alleged in the complaints.[30]

26. The defendants filed responses to the show cause orders on August 16, 1989. MCI filed comments thereto on August 30, 1989. In addition, the three US West defendants filed a joint reply to MCI's comments, along with a contingent motion to accept the reply, on September 11, 1989.

27. The defendants' arguments in response to the show cause orders are based primarily on the contention that the statutory scheme of the Communications Act does not provide for the payment of reparations based upon profits earned under a lawfully filed and effective tariff; therefore, the defendants claim, MCI's complaints failed to state a *prima facie* case under Section 208 of the Act. Even if allegations that defendants earned in excess of the lawful return prescribed by the Commission could support a valid cause of action, the defendants claim that such earnings would have to be measured on a "total company" basis, which some describe as the carrier that filed the tariff (*i.e.*, the Bell Operating Company level) and the US West carriers describe as the parent holding company level. In no event, the defendants contend, can this Commission lawfully enforce its rate of return prescription on a study area and access service category basis. Defendants argue that the Court in *AT & T v. FCC* found this type of rate of return enforcement mechanism to be unlawful. When considered in light of this decision, the defendants argue, MCI's complaints fail to state a claim upon which relief may be granted.

28. The defendants further claim that MCI's complaints are flawed in the same manner as the "automatic refund" mechanism struck down by the Court in *AT & T v. FCC* ; that is, both the complaint and the automatic refund mechanism would have a carrier disgorge purported overearnings (*i.e.*, revenue "peaks") in individual access service categories without recognizing that such action will depress earnings below authorized levels because purported underearnings (*i.e.*, revenue "valleys") are not correspondingly uplifted to compensate. Several defendants claim that if MCI is awarded the damages it seeks, this Commission must find in the defendants' favor with regard to counter-claims they have filed against MCI to recoup earnings shortfalls.

29. Michigan Bell and Wisconsin Bell make the additional claim that the Bureau erred in ruling that the rates at issue were not Commission-prescribed but instead were carrier-initiated rates developed according to general Commission guidelines. Citing *Arizona Grocery v. Atchison, Topeka and Santa Fe Railway Co.*[31] and *Moss v. CAB*,[32] the defendants contend that the rates were the product of repeated Commission directives and cannot be said to reflect the free will of the carriers. According to the defendants, the Commission not only set the formula and the maximum return, but also reviewed and rejected various nonconforming tariff filings with specific instructions on how the tariffs were to be revised. Thus, defendants contend, the subject rates were not carrier-initiated and the Bureau exceeded its lawful authority in holding that the rates are subject to retroactive reductions through an award of reparations or damages.

30. The defendants next contend that the Bureau's show cause orders are inappropriate in the context of Section 208 complaint proceedings and the Bureau's use of such an approach constituted procedural error. According to defendants, complaints for damages under Section 208 of the Act are adjudicatory proceedings, the resolution of which requires the complainant -- not the defendant -- to produce evidence of a violation and evidence of damages. The defendants maintain that due process and the Administrative Procedure Act[33] guarantee the defendants the right to challenge any evidence presented by the complainant and to submit evidence of their own. The defendants argue that the Bureau effectively short circuited

these guarantees by shifting the burden of pleading and proving damages to the defendants. The defendants claim that the Bureau's approach is particularly inappropriate in light of the Court's ruling in *AT & T v. FCC* because that case, they argue, establishes that overearnings in individual access service categories do not necessarily translate into or reflect damages.

31. The defendant US West carriers make the additional claim that the Bureau "overstepped" its lawful delegated authority in issuing the show cause orders. According to US West, the Bureau may not lawfully adjudicate formal complaints, at least beyond dealing with facially defective complaints under the Commission's Rules. Otherwise, US West states, formal complaints must be designated for hearing under Section 0.291(e) of the Commission's Rules. US West contends that the Bureau's show cause orders and the decisions rendered therein were unlawful and, therefore, should be vacated.

32. The defendants, with the exception of the US West Operating Companies, contend that, in any event, the damage computations required by the Bureau are inadequate to satisfy MCI's burden of proof because they do not and cannot show any damage to MCI. Defendants argue that the show cause orders are premised on the erroneous assumption that MCI would have paid in total a lesser amount for interstate access services if the defendants' rates in the overearnings categories had been less. Defendants maintain that this assumption is unsupported by the record and argue that MCI could have conceivably incurred the same or higher total costs if it had ordered and received either a greater volume of services or a different mix of services as a result of the hypothetical lower rates.[34] The defendants contend that without recalculating MCI's costs, rates, demand revenues and profits, it is impossible to conclude that MCI has been damaged by defendants' rates.

33. The defendants also restate the argument that MCI's claims for damages are partially barred by the two year statute of limitations contained in Section 415 of the Communications Act. The defendants contend that it is incorrect to conclude the two year limitations period did not begin to run until the defendants filed their rate of return monitoring reports on September 30, 1987 because MCI possessed sufficient information regarding the defendant's alleged overearnings which form the basis of its claims long before the monitoring reports were filed with the Commission. Therefore, defendants contend, the Bureau's failure to uphold the application of the statute of limitations to MCI's claims was incorrect as a matter of law and constitutes reversible error.

34. Finally, Pacific Bell contends that assuming the defendants are properly subject to damage claims, MCI should be denied prejudgment interest because MCI's request for interest is predicated on the Commission's grant of interest associated with amounts to be automatically refunded in the Docket 84-800 proceeding. Pacific Bell states that the court in *AT & T v. FCC* invalidated the automatic refund plan, including the obligation to pay interest on overearnings, and argues that therefore, MCI's request for prejudgment interest as provided in the Docket 84-800 proceeding may not be relied upon as a basis for an award of interest on any damages to which it may be entitled. Pacific Bell further contends that there is no statutory basis for such an award since neither Section 208 nor Section 209 of the Act, which together provide the basis for complaints under the Act and authorize the Commission to order the carrier to pay damages, provides for the payment of prejudgment interest.

35. In its reply to the defendants' responses to the Bureau order to show cause, MCI asserts that the Bureau's orders are valid. According to MCI, this Commission's rate of return prescription has binding, prospective effect; that rates earning in excess of the prescription are unlawful under the Communications Act; and that this Commission can order the payment of damages to a complainant in a proceeding in which, as here, a complainant establishes that a carrier's rates overearned and the complainant paid such rates. According to MCI, the payment of such damages does not constitute retroactive ratemaking but, instead, is merely the enforcement of a valid, prospective rate order. MCI also contends that defendants' overearnings on some rates are not excused by underearnings on other rates, and that there is no provision of the Act that will support the defendants' counterclaims against MCI to recoup past underearnings.

36. MCI contends that the holding in *AT & T v. FCC* is not as broad as the defendants contend and does not preclude the relief MCI seeks in its complaints. MCI states that the court in that case emphasized the Commission's authority to enforce its prescription authority by ordering refunds of carrier overearnings. MCI states further that although the court struck down the the portion of this Commission's prescription relating to the automatic refund mechanism, that mechanism plays no role in MCI's complaints and the remaining portions of the prescription have the same continuing legal effect as if *AT&T v. FCC* never had been decided. Moreover, MCI contends, a private complaint for damages cannot be equated with the automatic refund mechanism because: (1) a complaint is initiated by a customer instead of operating automatically in accordance with a Commission rule; and, (2) a complaint does not seek a refund of overearnings to a class of customers on a recurring basis but, instead, seeks the payment of damages to a particular complainant as reparations for injury suffered by that complainant during a specific, limited period.

37. Finally, MCI argues that the Bureau did not violate the defendants' due process rights by directing them to calculate the amount of damages. The order does not shift the burden of proving damages to the defendants, MCI claims, because the defendants already admitted the overearnings alleged by MCI; all that remains is for the defendants to ascertain the precise amount of damages based on information that is in their sole possession. According to MCI, the proper measure of such damages is the difference between the amount paid and the reasonable rate. MCI claims that there is no need for it to demonstrate the impact of their excessive rates on its profits in order to establish damages, and it further claims that the defendants' statements to the effect that AT&T was charged the same rates are irrelevant to these complaint proceedings. MCI also maintains that the Bureau acted well within its delegated authority in adopting and issuing the order.

IV. DISCUSSION

38. On the basis of our examination of the record, we conclude that complainant MCI has proven that the defendants violated the Communications Act and are liable to MCI to the extent it can establish that it was damaged

thereby. MCI has chosen to pursue damages in a supplemental complaint, and it is entitled under our rules to proceed in this manner.[35]

39. The Communications Act grants private parties a right to file complaints against carriers and authorizes the FCC to award damages, 47 U.S.C. §§ 206, 208-209, and MCI filed its complaints against the defendants pursuant to these provisions. Under our rules, all that is required to make out a *prima facie* case in a complaint proceeding is a filing containing "facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation . . . ."[36]

40. The case MCI presents is straightforward. The action it alleges the defendants have "done or omitted to be done" in contravention of the Act, 47 U.S.C. § 208, is to achieve earnings in excess of the Commission's order prescribing a rate of return applicable to the defendants, thereby making the rates MCI paid unjustly and unreasonably high in violation of Section 201(b) of the Act. In support of its allegations, MCI offered evidence in the form of monitoring reports filed with the Commission by the defendants which show that they earned returns in one or more categories in excess of the 13.25 percent allowable return provided for in the Commission's rules. MCI contends that it was damaged as a result of paying the defendants' rates.

41. Defendants allege that MCI's complaints do not make out a *prima facie* case. The defendants do not dispute that the Commission prescribed a rate of return. Indeed, they affirmatively present selected aspects of that prescription as a defense to MCI's claims.[37] They admit that the reports they prepared and filed with the Commission show earnings in excess of 13.25 percent in one or more access categories. Thus, there are no disputed material facts in the record going to liability.[38]

42. The defendants argue that judgment cannot be entered for MCI for reasons that fall into four general categories. The first contains arguments that earning in excess of a rate of return prescription is not a violation of the Act or any valid Commission rule or order; and, even if such action could be considered a violation, it could occur only if the return was exceeded by the company "overall." Included in this first category is the argument of several defendants that a carrier cannot violate the Act by charging the rates in its tariff. In the second category are arguments that MCI cannot recover because the rates in effect during the period in question were prescribed by the Commission, not carrier-initiated. Category three contains claims that MCI's complaints are barred by the statute of limitations. In the fourth category are arguments that the defendants' due process rights have been violated by the Common Carrier Bureau's orders to show cause. We discuss each category, in turn, below.

A. ***Violation of the Act***

43. This category contains several different arguments by the defendants as to why MCI's complaints are invalid. Several defendants claim that an award of the damages it seeks would constitute retroactive ratemaking.[39] Wisconsin Bell contends that MCI's action is barred because it seeks, "in effect," a remission of tariffed charges in contravention of Section 203(c) of the Act.[40] US West states that the "notion that a carrier could violate the Communications Act by charging the amounts specified in its tariffs would appear ludicrous on its face."[41]

44. The broadest argument in this category is made by US West, which claims that earnings in excess of this Commission's prescribed return cannot establish a violation of the Act because "the statute *never* mentions 'excessive returns' – it requires a complainant to demonstrate a violation of the Act and the Act only speaks of ' *rates*, ' not 'returns.'"[42] In support of its additional claim that high profits do not necessarily establish that a rate is unjust and unreasonable, US West quotes a number of different authorities. These include a statement from the court's opinion in *Nader v. FCC* that "a rate of return is just one component of a rate,"[43] as well as the Commission's statement in its order adopting the prescription: "'returns that slightly exceed . . . a target [return] have never been and should not be deemed unjust.'"[44]

45. All of the defendants claim that MCI's complaints are barred as a result of the holding in *AT & T v. FCC*, which invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to categories of customers.[45] This claim is presented in two arguments. Pacific states the first most succinctly:

> The Commission's refund rule required carriers to automatically refund earnings in excess of the authorized rate of return. For refund purposes, the Commission viewed the rate of return as a maximum return. However, the Commission has always treated the rate of return for ratemaking purposes as the minimum and maximum return. In *AT & T*, the court found that these differing concepts resulted in the Commission's contradicting its own theory of rate of return regulation. Because of this contradiction, the court found the Commission's action to be arbitrary and capricious and invalidated the refund rule . . . . Merely changing the remedy from a "refund" to a "damage award" does not cure this fundamental infirmity.[46]

46. The gist of the defendants' second argument is that under the holding in *AT & T v. FCC*, the Commission must consider a carrier's underearnings in determining whether particular overearnings are in violation of the Act. This "peaks and valleys" argument is presented several different ways. Pacific suggests that the case bars all damage awards because even a system permitting damages for "overall overearnings" in any particular period would virtually guarantee an earnings shortfall for all such periods viewed together.[47] Other defendants admit that a judgment could be made about earnings in a particular period, but advance different methods of calculating "overall" earnings within the period. For example, US West contends that overearnings could be judged only according to the aggregated returns of all its operating companies because "'investors in a carrier, after all, must invest in the carrier as a whole.'"[48] In a consolidated pleading, defendants C&P, New Jersey Bell, and Diamond State, seek to have their earnings measured at their individual corporate levels, rather than in relation to each other or to other subsidiaries of their parent holding company, Bell Atlantic.[49]

47. After careful consideration of the pleadings, we conclude that the defendants' arguments have no merit.

48. Wisconsin Bell offers no support for its claim that MCI's complaints are barred by Section 203 of the Act, nor did US West support its contention that a carrier

cannot be found to have violated the Act by charging the rates in its tariff. Contrary to the defendants' claims, however, legally effective, carrier-initiated tariffs can always be challenged as unreasonable and unlawful. As the Supreme Court has stated:

> In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the *legal* rates, that is, those which must be charged to all shippers alike.
>
> Although the Act thus created a legal rate, it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate - it was lawful only if it was reasonable . . . .[The] shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation.[50]

49. Moreover, the defendants, in claiming that high profits do not necessarily mean a rate is unreasonable, miss the point. The issue in these proceedings is not whether high profits in the abstract are unlawful, but whether profits in excess of a prescription are unlawful. US West invokes and relies upon this Commission's statement that "returns that slightly exceed a target [return... have never been and should not be deemed unjust." That statement is not helpful to US West, however, because it is part of the explanation of our rationale for establishing, above the targetting return, a buffer that would be used to determine whether a prescribed return had been violated. MCI has taken that buffer into account in filing its complaints. In context, the statement stands for the proposition that carrier earnings over and above the buffer -- like those US West has admitted to during the period covered by MCI's complaints -- are unlawful.

50. The defendants' arguments would be persuasive only if one assumed that a rate of return prescription requires carriers to target their rates at that level but has no meaning in relation to the actual performance of those rates. This assumption conflicts with settled law.

51. The Commission has authority under the Communications Act to prescribe carriers' rates of return.[51] In upholding this authority, the D.C. Circuit determined that rate of return prescriptions are a valid exercise of our authority under Sections 4(i) and 205 of the Act, and that such prescriptions are "necessary for the Commission to carry out its [ratemaking] functions in an expeditious manner."[52]

52. The prescription of a rate of return establishes a requirement more far-reaching than merely that it be used in the development of a carrier's rates.[53] As the court in *Nader* explained, a rate of return prescription, like any other Section 205 prescription, is binding: it limits the utility prospectively.[54] Subsequent to the *Nader* decision, the binding effect of such a prescription was reaffirmed by the D.C. Circuit in *New England Telephone*. In its opinion in that case, the court emphasized that an order setting a maximum rate of return is "a valid Section 205 prescription" having the "force of statute . . . . The carrier . . . is bound to conform".[55] In addressing the targetting argument directly, the court stated:

> Petitioners . . . contend that the nature of their obligation was merely to try in good faith to formulate rates that would not produce an excessive return. In the Commission's view, by contrast, the prescription imposed a maximum return that the carriers could not exceed, however innocently . . . .
>
> The idea of a prescription under Section 205 is that the agency has proclaimed that a certain situation... is unlawful and *shall not occur*. Certainly carriers cannot intentionally try to violate an outstanding prescription, but that does not mean that they may achieve through inadvertance what they were forbidden from doing by design.[56]

53. Contrary to the defendants' assertions, the case law supports MCI's argument that the enforcement of a rate of return prescription does not violate the rule against retroactive ratemaking, for a simple reason: the obligation being enforced was set prospectively when the prescription was adopted. The defendants either do not address the *New England Telephone* case, which MCI presents as support for its complaints, or dismiss the case as a departure from precedent.[57] But none of the decisions cited by the defendants supports a contrary view. With one exception, none of those decisions involved an existing, prospectively defined prescription. The exception, *AT & T v. FCC*, also provides no support for their claims about retroactive ratemaking or the limited reach of rate of return prescriptions. The court in *AT & T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription.[58]

54. We also are not persuaded by the defendants' other claims that the holding in *AT & T v. FCC* controls these proceedings and bars judgment for MCI. In that case, the court determined that the remedy component of the Commission's rate of return prescription -- the automatic refund mechanism -- was unlawful. The defendants argue that in striking down a remedy conceived by the Commission and based on its authority under Sections 4(i) and 205, the D.C. Circuit also invalidated private actions for damages conceived by Congress and expressly provided for in Sections 206 through 209 of the Act. This argument finds no support in the court's opinion.

55. The opinion of the court distinguishes the automatic refund mechanism from the prescription as a whole, finding only the former invalid.[59] That mechanism plays no role in these complaint proceedings. Moreover, the automatic refund mechanism and private actions for damages are distinctly different from each other. The automatic refund mechanism resulted from a Rule Making initiated at the Commission's discretion. In contrast, private actions for damages were established by Congress as part of the Act. They do not operate automatically, nor are complainants members of a class of customers defined by the Commission. Complainants do not seek the benefit of a future rate reduction, as the automatic refund mechanism provided. Each complaint must be initiated by a private party seeking damages for an injury *to itself*, and that party carries the burden of establishing both a viola-

tion of the Act and the actual injury.[60] If a complainant meets this burden, the Act expressly authorizes the Commission to order the carrier to pay damages.[61]

56. Moreover, the defendants do not offer a plausible basis for reading the opinion in *AT & T v. FCC* as they suggest. The opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein. Although the defendants invoke the decision in support of a broad constitutional claim that the Commission must take their underearnings into account when considering private actions for damages resulting from earnings in excess of a prescription, the court explicitly declined to base its decision on constitutional grounds.[62] The court's discussion of constitutional issues appears in a portion of the opinion separate from the holding, and consists of "guidance" offered "in case the Commission chooses to reformulate the refund rule."[63]

57. In any case, the Constitution does not prohibit the Commission from ordering damages when a carrier has overearned in a service category. The implication of the defendants' claim is that they are entitled, as a constitutional matter, to charge their customers excessive rates for one category of service as long as these earnings are balanced by a deficiency in earnings in another category; in short, that they are entitled to cross-subsidize. This clearly is not the case. The prevention of cross-subsidization has long been recognized as a lawful objective of rate regulation.[64] Regulatory agencies have the authority, indeed the duty, to protect ratepayers from such exploitation.[65]

58. Courts have made clear that carriers assume the risk of both losses for services they underprice and the prospect of returning amounts realized through rates that are unjustly and unreasonably high.[66] The case law also indicates that a carrier may be required to make whole those who have been injured by discrimination and cross-subsidized rate structures without regard to whether the carrier has achieved its authorized return overall. [67]

59. It does not disturb the balance of ratepayer and shareholder interests embodied in the Act to award damages to customers who demonstrate that they were injured by paying rates that resulted in a carrier earning in excess of its prescribed return. Even when a carrier operates under a prescription of a rate of return for broad categories, the carrier retains substantial flexibility in formulating rates.[68] Carriers are permitted to make mid-course corrections if their actual return deviates from the authorized return. If actual earnings are higher than the authorized return, a carrier can file reductions and thereby avoid the risk of being ordered to pay damages. If actual earnings are below the authorized return, a carrier can file rate increases. Defendants had ample notice of our rules, which were developed in notice and comment Rule Making proceedings in which all of them participated, as well as the level of the prescription for each category. As a general matter, it would be inequitable to permit defendants, who were in the best position to set their rates at lawful levels in the first place, and who later had opportunities to correct those rates, to avoid responsibility for those unlawful rates, at the expense of their customers.

60. Against this background, we are not persuaded by the defendants' claims that earning in excess of a prescribed rate of return does not violate the Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.[69] The first claim is at odds with case law, including *Nader*, *New England Telephone*, and *AT & T v. FCC*. [70] Contrary to the defendants' contentions, the holding in *AT & T v. FCC* provides no support for their second claim. Indeed, as discussed previously, the rationale underlying this claim has been rejected explicitly by the D.C. Circuit and the Supreme Court.[71] We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of that amount during the period in question.

61. Finally, with regard to the defendants' second claim, and MCI's claim to the contrary, that we lack discretion in proceedings under Sections 206-209 of the Act to consider a defendant's "peak" and "valley" earnings,[72] the Common Carrier Bureau's orders to show cause stated:

> If in response to this order to show cause, however, defendant elects to argue that the Commission *should* consider the impact on the defendant's overall return that would result from an award of damages in the instant proceeding, the defendant should include in its response a precise accounting of that impact.[73]

62. Pacific's submission in response to that show cause order indicates that its "total company" earnings would exceed prescribed levels even after an award of damages to MCI. The C&P Companies' submission shows that an award of damages would have a *de minimis* impact on its "total company" earnings, lowering them from 12.38 percent to 12.37 percent. Similar *de minimis* impacts are reflected in the submissions of New Jersey Bell (from 13.03 percent to 12.98 percent) and Diamond State (from 12.36 percent to 12.34 percent). The remaining defendants declined to provide an accounting of the impact on their earnings of a potential damage award to MCI.[74] This record provides no basis for resolving questions concerning this Commission's discretion to consider the relevance of "peak and valley" earnings in a rate of return complaint proceeding, and we will not do so in the course of resolving the instant complaints.

B. ***Rates In Effect Were Prescribed By Commission***

63. Michigan Bell and Wisconsin Bell contend that MCI's complaints are barred because the rates in effect during the period in question were prescribed by the Commission. The defendants' arguments are not persuasive.

64. It is well-settled law that the prescription of a rate of return is not a prescription of rates. In *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975), the court stated: "[W]e cannot agree that the Commission has literally prescribed rates, for the charge itself cannot be equated with a rate of return . . . . a rate of return is merely one component of a rate." Thus, in prescribing the rate of return component of the defendants' rates, the Commission did not prescribe the rates themselves.

65. Nor can it be argued plausibly that the defendants' rates were prescribed merely because the defendants were required to conform such rates to the Commission's Part 69 access charge rules. While Part 69 of our rules defines major aspects of the defendants' interstate rate structure,

and includes many steps they must follow in order to compute rates, the D.C. Circuit already has held that such rules do not "determine the legality of specific rates."[75]

66. The defendants, however, also argue that the rates complained of by MCI were the product of their response to Commission orders relating to its review of their access tariff filings during the period from October 3, 1983 to April 1, 1985. These orders, defendants allege, were so detailed as to leave to them merely the performance of "the ministerial task of gathering data, plugging the data into the Commission's formula, and doing mathematical computations to arrive at the access tariff rates"; and, therefore, the resulting rates were not carrier-initiated but, instead, were the result of a rate prescription.[76]

67. The question whether an agency prescribed a rate must be determined by looking at the practical consequences of its actions.[77] As the court in *Direct Marketing Association, Inc. v. FCC*, 772 F.2d 966, (D.C. Cir. 1985), after surveying the case law, concluded:

> [T]he courts have considered the amount of pressure on the subject of the order, as measured by the options available to the subject and the amount of threat that the agency will suspend nonconforming tariffs. In practice, an agency statement has not been found to be a prescription absent explicit language that nonconforming tariffs will be rejected, combined with an agency motive to avoid public scrutiny and perhaps even judicial review.[78]

68. Thus, the test for determining whether a *de facto* prescription exists has two parts: (1) the degree of pressure imposed by the Commission and its impact on a carrier; and (2) the possibility that the Commission did not state it was acting under Section 205 of the Communications Act, 47 U.S.C. § 205, in order to avoid the public hearing required by that section. The defendants have not persuaded us that either part of this test has been satisfied with regard to the rates at issue in these complaint proceedings.

69. The Commission orders cited by the defendants were adopted during our review of the initial attempts by local exchange carriers (LECs) to tariff interstate services in accordance with our access charge plan.[79] The tariffs implementing that plan revised the rates and terms for nearly every interstate telecommunications service. Although, as noted previously, that plan establishes an overall rate structure for LECs and a methodology for allocating many costs within that structure, the plan does not determine the carriers' costs or the forecasts on which their proposed rates are based.

70. In carrying out our responsibility to review these filings, the Commission found, *inter alia*, that the carriers' representations about their costs and forecasts raised substantial concerns about the lawfulness of their rates. Therefore, pursuant to the Act, we initiated a comprehensive investigation of the tariffs "to resolve at least the major issues necessary to assure that generally reasonable, workable access tariffs are in place . . . ."[80] In that investigation, we adopted a series of orders either rejecting LEC filings or suspending them for purposes of investigation.

71. The defendants do not offer evidence that these proceedings were conducted in a manner designed to avoid the public hearing requirement of Section 205 or judicial review. A review of the record of these proceedings demonstrates the contrary. The Commission's rules provide for public participation in tariff proceedings.[81] Interested parties availed themselves of the opportunity to participate in these proceedings and their commments were considered by the Commission.[82] Thus, this aspect of the test for determining a *de facto* prescription is not satisfied.

72. The defendants assert, correctly, that the orders all contained an explanation of the basis for our actions and provided guidance, including specific instructions about actions that needed to be taken to bring access tariffs into compliance with the Act. The defendants argue that the orders must constitute a rate prescription because they were required to comply. They offer no specific examples of particular instructions, but appear to be arguing that the act of providing guidance and establishing requirements, in and of itself, demonstrates that rates filed in response to our orders were prescribed.[83] This is not the law.

73. The Act provides for Commission review of carrier rates.[84] Such review would be meaningless if it could not result in constraining the carriers' actions, and it would be considerably more time-consuming if the Commission were not permitted to give carriers some guidance as to what might be acceptable. In addressing this issue on review of actions similar to those at issue here, the Supreme Court stated:

> No principle of law requires the Commission to engage in a pointless charade in which carriers . . . are required to submit and resubmit tariffs until one finally below an undisclosed maximum point of reasonableness is allowed to take effect. The administrative process, after all, is not modeled on "The Price is Right."[85]

74. The defendants also offer quotes from various orders which contain the word "prescription." These quotes do not, however, refer to the prescription of rates. The fact that the Commission may have prescribed certain aspects of the rate structure does not mean the rates themselves were prescribed. Moreover, if it were true that the rates filed in response to the orders actually were prescribed, the carriers would not have been free to change those rates until further order by this Commission. In fact, the entire LEC industry, including the defendants, revised their access tariffs comprehensively *after* the orders cited by the defendants were adopted. These revisions occurred *before* the October 1985 through December 1986 period covered by MCI's complaints.[86] Thus, the defendants have not demonstrated that the second component of a *de facto* prescription existed with regard to these rates.

75. Against this background, we find that the defendants have not established that the rates they charged during the period at issue in these proceedings were prescribed.

C. *Statute of Limitations*

76. The defendants make two claims with regard to the statute of limitations. The first, raised by US West, is that it is immaterial when a complainant learns of the fact that a carrier has exceeded a prescribed rate of return because such earnings are not sufficient to establish a *prima facie* case of unlawfulness under the Communication Act.[87]

This claim cannot stand in view of our previous determination that violating a rate of return prescription does, indeed, constitute a violation of the Act.

77. The defendants' second claim is that all or a portion of MCI's claims are barred by Section 415 of the Act, which establishes a two year statute of limitations on the filing of complaints.[88] According to the defendants, Section 415 bars MCI's complaints at least for rates paid prior to February 9, 1986, two years before the date on which it filed its complaints.

78. This argument is not persuasive. The purpose of Section 415 is to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed.[89] The statute does not begin to run, however, until discovery of the right or wrong or of the facts on which such knowledge is chargeable in law.[90] Here, the defendants filed the rate of return monitoring reports which, as previously noted, were developed by the Commission for several purposes, including making information about carrier earnings publically available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.[91] Under these circumstances, Section 415 poses no bar to MCI's complaints.

D. ***The Bureau's Show Cause Orders***

79. The arguments in support of defendants' claim that the Common Carrier Bureau overstepped its delegated authority are advanced primarily by the US West defendants, although all of the defendants generally argue that the Bureau exceeded its authority in adopting the show cause orders. These claims rest on the assumption that the Bureau has no authority to act in complaint proceedings. This assumption is incorrect.

80. The general authority of the Bureau with respect to the adjudication of Section 208 complaints is firmly established in Sections 0.91 and 0.291 of the Commission's Rules.[92] Section 0.291 expressly delegates to the Chief of the Common Carrier Bureau the "authority to perform all functions of the Bureau, described in Section 0.91" unless otherwise specifically limited. Section 0.91(a) empowers the Bureau to act "for the Commission under delegated authority, in matters pertaining to the regulation and licensing of communications common carriers," which encompass " *adjudicatory* and Rule Making proceedings, including *rate* and service investigations [and] determinations regarding *lawfulness of carrier tariffs.* " (Emphasis added.) Because Section 0.91 plainly includes the authority to act for the Commission in connection with a Section 208 complaint, there can be no question under these rules of the Bureau's authority to issue the show cause orders.[93]

81. The Bureau's delegated authority under Part 0 of our Rules must, of course, be consistent with the Communications Act. The Bureau's delegated authority to act in complaint proceedings has been affected by 1988 amendments to Section 5(c)(1) of the Communications Act, but not in any way related to the action complained of by the defendants. These amendments reserve to the Commission the authority to adjudicate certain Section 208 complaints.[94] The show cause orders, however, do not purport to be a determination of unlawfulness or liability as to any aspect of MCI's complaints; rather, orders to show cause are, by their very nature, interlocutory. They are nothing other than a lawful attempt by the Bureau to facilitate the Commission's ability to issue a decision on the merits in these complaint proceedings within the statutory timeframe.[95]

82. The US West Companies' arguments that the Bureau could not properly take any action with respect to the instant complaints because they present "novel questions of law" are equally unavailing. It is unnecessary to decide in this proceeding whether the Bureau has authority to consider such questions because no novel questions were addressed in the Bureau's orders. The Commission's authority to prescribe a common carrier's rate of return is well-established.[96] In addition, the Court of Appeals in *AT&T v. FCC* and *New England Telephone* specifically recognized the right to a statutory remedy when a carrier's interstate earnings have exceeded the maximum rate of return prescribed by the Commission.[97] It is clear that any question regarding the authority of the Commission to enforce a valid rate of return prescription has long been settled by the Commission and the courts. Thus, it cannot be said that the Bureau considered "novel" questions of law. Moreover, this issue is moot in view of our actions in this order, which is not a reconsideration of the Bureau's orders but is, instead, a determination by this Commission on the record of this proceeding.

83. The defendants also claim that the Bureau improperly shifted the burden of proof by requiring them to submit calculations of the amount of their overearnings, and that due process and the Administrative Procedure Act require that MCI's complaints be set down for hearing before an administrative law judge.

84. The defendants have provided no persuasive authority in support of their claim that they are entitled automatically to a hearing before an administrative law judge to resolve questions concerning damages. Section 208 of the Act does not mandate any particular form of procedure in complaint cases. When Section 208 is construed in conjunction with the Act's general procedural authorization in Section 154(j), it is abundantly clear that the decision of when trial-type hearings are necessary under Section 208 is one which lies within the discretion of the Commission, or by the Bureau pursuant to delegated authority.[98] With respect to constitutional due process, there are no material disputed questions of fact at this stage of these proceedings; the issues are legal, not factual, in nature.[99]

85. Moreover, while we agree with the defendants' assertion that MCI bears the burden of proof in these proceedings, we reject the claim that they cannot be ordered in a complaint proceeding to provide evidence bearing on the amount of damages. It is well settled that defendants in a complaint proceeding may be required to produce such evidence where the complainant has made a *prima facie* showing of a violation and where the relevant information for measuring actual injury is solely within the possession or control of the defendants.[100]

86. It is not necessary, however, to resolve the question whether the Bureau was acting lawfully in the show cause orders by ordering the defendants to produce evidence bearing on damages relating to MCI complaints, or any other question raised by the defendants and MCI regarding damages. MCI's complaint contains allegations that identify with reasonable certainty the amount of damages for which recovery is sought. It has reserved its right under our rules to file a separate complaint to plead and prove such damages. We will, therefore, reserve judgment

on damage issues until both the complainant and the defendants have the opportunity to address these issues and establish a full record on which we can base a judgment. In this order, we do no more than render judgment for MCI on the merits of its original complaint. We find that the defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for such damages as MCI can demonstrate. Pursuant to our rules, MCI is entitled, within 60 days after public notice of this decision on the merits, to file a supplemental complaint concerning damages.

V. ORDERING CLAUSES

87. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201 and 208 of the Communications Act, as amended, that the above-captioned Complaints filed by MCI Telecommunications Corporation ARE GRANTED to the extent indicated herein.

88. IT IS FURTHER ORDERED, that the cross-complaints filed by the US West Carriers ARE DISMISSED.

89. IT IS FURTHER ORDERED, that MCI, in accordance with the Commission's rules, *see* 47 C.F.R. § 1.722, may file supplemental complaints concerning damages within 60 days after public notice of this decision.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] 47 U.S.C. § 151 (1982).

[2] 47 U.S.C. § 201(b), 202(a) (1982).

[3] 47 U.S.C. §§ 220 (1982).

[4] 47 U.S.C. § 214 (1982).

[5] 47 U.S.C. §§ 203-204 (1982).

[6] 47 U.S.C. § 205(a) (1982).

[7] 47 U.S.C. § 154(i) (1982).

[8] 47 U.S.C. § 501 *et seq.* (1982).

[9] 47 U.S.C. §§ 206, 208-209 (1982).

[10] *Nader v. FCC*, 520 F.2d 182, 203-204 (D.C. Cir 1975). *See United States v. FCC*, 707 F.2d 610 (D.C. Cir. 1983). The D.C. Circuit ruled that such rate of return prescriptions are "necessary for the Commission to carry out its [ratemaking] functions in an expeditious manner." *Nader v. FCC*, 520 F.2d at 204.

[11] On one occasion during this period, AT&T's earnings exceeded the return established by the Commission for determining compliance with our prescription. The Commission's order directing AT&T to refund its overearnings was upheld by the U.S. Court of Appeals for the District of Columbia Circuit. *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987) (*New England Telephone*), *cert. denied*, 109 S. Ct. 1942 (1989).

[12] Although the Commission prescribed a rate of return for the Bell System alone and not for so-called "independent" (*i.e.*, non-Bell) local exchange carriers, the return prescribed for the Bell System operated indirectly as a check on the justness and reasonableness of all local exchange carrier earnings because of the existence of a process known as "settlements and division of revenues." Essentially, this process entailed the pooling of costs and revenues among the Bell System companies and, separately, between them and the independents. The process was referred to as a "partnership" because it helped all the participants achieve a relatively stable and uniform return on their investment. For a more complete discussion of the "partnership" process and its impact on the industry, see *MTS and WATS Market Structure, Second Supplemental Notice of Inquiry and Proposed Rule Making*, 77 FCC 2d 224, 226-231 (1980); *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Federal - State Joint Board, Recommended Decision and Order*, 2 FCC Rcd. 2324, 2337-2340 (1987).

[13] The Commission has prescribed for all local exchange carriers, including the defendants, a methodology known as the "access charge system," which carriers are required to follow in tariffing their interstate services. The system determines, *inter alia*, the carriers' overall rate structure and the allocation of costs within that structure, and was in effect during the period covered by the complaints. The access charge system is codified in Part 69 of the Commission's rules. *See* 47 C.F.R. § 69.1 *et seq.* (1988). These rules were developed in a proceeding that was the subject of numerous challenges on appeal. With a few exceptions not relevant to the instant complaint proceedings, these appeals were denied by the D.C. Circuit. *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985). During the access charge Rule Making, the Commission terminated the "settlements and division of revenues" agreements because the "partnership," as it was then structured, was incongruent with the rapidly changing industry structure. It was replaced by more limited pooling arrangements, within the access charge framework, in which only local exchange carriers participated. *MTS and WATS Market Structure, Third Report and Order*, CC Docket No. 78- 72, 93 FCC 2d 241, 326-330 (1983).

[14] *See Authorized Rates of Return for the Interstate Services of AT & T Communications and Exchange Telephone Carriers*, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41350 (Oct. 10, 1985), (*Phase I Order*), *on reconsideration, Memorandum Opinion and Order*, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 1103 (Apr. 1, 1986) (*Phase I Reconsideration*); *on further reconsideration*, 2 FCC Rcd 190 (1987). *See also Procedures and Methodologies to Establish Reporting Requirements*, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[15] *Phase I Order*, 50 Fed. Reg. at 41353.

[16] *See, e.g., Phase I Order*, 51 Fed. Reg. at 41350, para. 1 ("In this phase of the proceeding, we address the maximum allowable rates of return and enforcement procedures for the regulated... interstate access services of local exchange carriers (LECs)"); *Id.*, 51 Fed. Reg. at 41352, para. 22 (Commission affirms decision tentatively adopted at earlier stage of proceeding that it "should not prescribe a minimum return requirement"); *see also New England Telephone*, 826 F.2d at 1108 (noting the Commission's practice not to set minimum guaranteed rates of return); *but cf. AT & T v. FCC*, *infra* n.23, 836 F.2d at 1390 (expressing the belief that the return prescribed by the Commission is the minimum possible return; it is both the "minimum and maximum").

[17] *Phase I Order*, 50 Fed. Reg. at 41352-53 (paras.13-21).

[18] *Id.* 50 Fed. Reg. at 41352 (para. 16). The foremost goal of the Commission's access charge proceeding was to prevent discrimination by establishing a single, uniform and nondiscriminatory tariff structure covering those services that

make identical or similar use of local exchange carrier facilities. *See MTS and WATS Market Structure, Third Report and Order*, CC Docket No. 78-72, 93 FCC 2d 241 (1983).

[19] *Phase I Reconsideration*, 51 Fed. Reg. at 1105 (para. 34).

[20] The 12.75 percent rate of return was prescribed by the Commission in 1981 for the unified Bell System. *AT & T Co.* 86 FCC 2d 221, 251 (1981). In reviewing this prescription on appeal, the District of Columbia Circuit held that the Commission had acted reasonably in selecting a return within a zone of reasonableness. *See United States v. FCC*, 707 F.2d 610, 615-619 (1983). Following divestiture, the Commission, pursuant to notice and comment Rule Making procedures, directed AT&T and the BOCs to target their rates to achieve a 12.75 percent return. *See MTS & WATS Market Structure*, 93 FCC 2d 241, 315-316 (1983). In the rate of return proceedings, the Commission determined, based on its review of the record, that the 1981 prescription would continue in force for an interim period (*e.g.*, until the Rule Making was completed and the methodologies and procedures adopted therein were available for prescribing a new rate of return). *Phase I Order*, 50 Fed. Reg. at 41350 (para. 4).

[21] *Phase I Order*, 50 Fed. Reg. at 41352 (para. 21). The initial review period was shortened in order to align it with the "test year" used by the carriers to develop their rates. *Id.* (para. 21 & n.26).

[22] 47 C.F.R. § 65.701(b) (1988).

[23] *AT & T v. FCC*, 836 F.2d 1386, 1390 (D.C. Cir. 1988).

[24] *Id.*, 836 F.2d at 1392.

[25] Due to the similarity of the issues and arguments raised by the parties, the complaints have been consolidated for disposition.

[26] The defendants are: Pacific Bell Telephone Company (Pacific Bell); Southwestern Bell Telephone Company (SWB); Wisconsin Bell, Inc. (Wisconsin Bell); The Chesapeake & Potomac Telephone Companies (C&P); New Jersey Bell Telephone Company (New Jersey Bell); Michigan Bell Telephone Company (Michigan Bell); The Diamond State Telephone Company (Diamond State); Mountain States Telephone & Telegraph Company (Mountain States); Pacific Northwest Bell Telehone Company (PNB); and Northwestern Bell Telephone Company (NWB). For the convenience of the reader, we occasionally refer to the last three listed defendants as US West or the US West Carriers.

[27] The interstate access categories are carrier common line, special, and switched traffic sensitive. *See* 47 C.F.R. § 65.702 (1988). The monitoring reports recite that for the period October 1, 1985 through December 31, 1986: Pacific Northwest Bell earned returns in the special access category of 15.09 percent in the State of Idaho and earned returns in the switched traffic sensitive access category of 14.76 percent in Oregon; Pacific Bell earned a return of 14.51 percent in the switched access category; Southwestern Bell earned returns in the special access category of 15.43 percent in Missouri and 15.99 percent in Oklahoma and earned returns in the switched access category of 14.21 percent in Arkansas, 16.21 percent in Kansas and 14.93 percent in Missouri; Wisconsin Bell earned a return of 16.66 percent in the switched access category; Michigan Bell earned a return of 13.37 percent in the switched access category; C&P earned a return of 13.38 percent in the switched access category; New Jersey Bell earned a return of 14.74 percent in the switched access category; Mountain States earned returns in the switched access category of 14.60 percent in Arizona, 15.81 percent in Idaho, 15.20 percent in Montana, 14.97 percent in New Mexico, 13.67 percent in Utah and 14.93 percent in Wyoming; Diamond State earned a return of 15.65 percent in the special access category; and Northwestern Bell earned returns in the special access category of 14.31 percent in Iowa, 13.85 percent in Minnesota, 13.63 percent in Nebraska and 16.01 percent in North Dakota and earned returns in the switched access category of 14.64 percent in Iowa, 14.44 percent in Minnesota, 15.79 percent in Nebraska and 19.71 percent in North Dakota.

[28] At the time the complaints were filed, Section 1.723(b) provided that "Damages will not be awarded upon a complaint unless specifically requested. Damages may be awarded, however, upon a supplemental complaint based upon the finding of the Commission in the original proceeding." That section has since been revised and renumbered, but continues to provide for the filing of supplemental complaints. *Compare* 47 C.F.R. 1.723(b) (1987) *with* 47 C.F.R. 1.722(b) (1988).

[29] MCI v. PNB, DA 89-889 (released Jul. 27, 1989); MCI v. Pacific Bell, DA 89-890 (released Jul. 27, 1989); MCI v. SWB, DA 89-891 (released Jul. 27, 1989); MCI v. Wisconsin Bell, DA 89-892 (released Jul. 27, 1989); MCI v. C&P, DA 89-893 (released Jul. 27, 1989); MCI v. New Jersey Bell, DA 89-894 (released Jul. 27, 1989); MCI v. Mountain States, DA 89-895 (released Jul. 27, 1989); MCI v. Michigan Bell, DA 89-896 (released Jul. 27, 1989); MCI v. NWB, DA 89-897 (released Jul. 27, 1989); MCI v. Diamond States, DA 89-898 (released Jul. 27, 1989).

[30] In making the calculation, defendants were asked to assume a study area defined by the geographical reach of defendants' filed tariff, a maximum allowable rate of return of 13.1 percent per overall interstate earnings, and a maximum allowable rate of return for any access service category of 13.25 percent. Calculations were to be explained fully with evidentiary support adequate to allow the Bureau and complainant to evaluate defendants' arguments and support documentation.

[31] 284 U.S. 370 (1932).

[32] 430 F.2d 891 (D.C. Cir. 1970).

[33] *See* 5 U.S.C. Section 552 *et seq.*

[34] Some of the defendants also argue that MCI has not been damaged by the rates in question because, even if the rates actually had been lower, MCI would have lowered its own rates in response to competitive pressure exerted by AT&T.

[35] Our rules provide that damages may be awarded in a supplemental complaint proceeding based on a determination by the Commission relating to the original complaint that it "contains appropriate allegations showing such evidence that will identify, with reasonable certainty, the amount of damages for which recovery is sought." 47 C.F.R. § 1.722 (1988).

[36] 47 C.F.R. § 1.720(b) (1988).

[37] As noted at para. 10, *supra*, in the prescription proceedings, the Commission established, *inter alia*, an authorized return for use in developing tariff rates and a "spread" or "buffer" above that return that would be used in proceedings relating to the enforcement of the prescription. During the period in question, LECs were notified that the maximum allowable rate of return for overall interstate earnings would be 13.10 percent, and that the maximum allowable return for any access service category would be 13.25 percent. The defendants rely on the continuing validity of the 13.10 percent overall interstate limitation as a defense to MCI's complaints. *See, e.g.*, US West Response to Order to Show Cause, at 20, Appendix A (alleging that US West Carriers' did not violate prescription because their aggregated overall interstate earnings was less than 13.10 percent).

[38] In their answers to MCI's complaints, Michigan and Wisconsin Bell assert that the methodology used to calculate the rates of return shown in their reports overstates their actual returns, but they neither discuss nor explain this contention. The methodology was developed and adopted in a Rule Making proceeding in which the Commission established a uniform method of calculating carriers' interstate rates of return for use in the enforcement of our rate of return prescriptions and to

assist us in the tariff review process. *See Amendment of Part 65, Procedures and Methodologies to Establish Reporting Requirements, Report and Order*, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987). The monitoring reports are entitled "FCC Form 492, Rate of Return Report," and carriers are required to file them with the Commission on a quarterly basis. *See* 47 C.F.R. § 65.600(b). The defendants participated in that Rule Making. They neither sought reconsideration nor pursued an appeal of decisions concerning the methodology. Therefore, their assertions about that methodology do not create a dispute about a material fact but are, instead, impermissible collateral attacks on decisions adopted in a proceeding in which their right to review has expired.

[39] *See, e.g.*, US West Carriers Response to Order to Show Cause, at 13-15; Bell Atlantic Response to Order to Show Cause, at 5.

[40] Wisconsin Bell Motion to Dismiss, at 15 n.29.

[41] US West Response to Order to Show Cause, at 14.

[42] *Id.*, at 26 (emphasis in original).

[43] US West Motion to Dismiss, at 2, quoting *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir 1975).

[44] US West Motion to Dismiss, at 10 citing *Phase I Order*, at para. 36. US West also quoted *The Western Union Telegraph Company*, 95 FCC 2d 881, 910 (1983) ("We believe that Telex usage element earnings which exceed the prescribed earnings level for Telex service overall by only 1 or 2 percentage points do not render the service element rates unreasonable[.]"). US West also claimed that the holding in *AT & T v. FCC* implies that rates earning in excess of a rate of return prescription are not unjust or unreasonable. *Id.*

[45] US West Reponse to Order to Show Cause, at 4, 10-17; Pacific Bell Response to Order to Show Cause, at 5-7; SW Bell Reponse to Order to Show Cause, at 6; Wisconsin Bell Reponse to Order to Show Cause, at 16-18; Michigan Bell Response to Order to Show Cause, at 16-18; C&P Response to Order to Show Cause, at 3-6; New Jersey Bell Response to Order to Show Cause, at 3-6; Diamond State Response to Order to Show Cause, at 3-6.

[46] Pacific Response to Order to Show Cause, at 6-7. *See also* US West Response to Order to Show Cause, at 14.

[47] *Id.*, at 8. Pacific also provides evidence that it earned 13.09 percent on its interstate operations during the period covered by MCI's complaint. Pacific argues that this return is "below the maximum authorized rate of 13.1 percent" and, "[t]herefore, no refund or damage award is due MCI." *Id.*, at 9.

[48] US West Response to Order to Show Cause, at 19, citing *AT & T v. FCC*, 836 F.2d at 1392.

[49] *See* Bell Atlantic Answer and Motion to Dismiss, at 2. These defendants claim they have not overearned because each of them earned less than 13.1 percent for the period in question.

[50] *Arizona Grocery v. Atchison, T. & S. F. R. Co.*, 284 U.S. 370, 384 (1932) (emphasis in original) (footnotes omitted). In this case, the Court was interpreting sections of the Interstate Commerce Act (ICA) establishing private actions for damages. These sections were lifted from the ICA by Congress when it adopted the Communications Act in 1934 and have remained essentially unchanged since that time. *Compare* 49 U.S.C. §§ 6-9 *with* 47 U.S.C. §§ 206-209. For that reason, the Commission often looks to cases decided under the ICA for guidance in deciding complaint cases.

[51] *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975).

[52] *Id.*, 520 F.2d at 204.

[53] Carriers are bound to abide by validly promulgated Commission orders until they are superseded. 47 U.S.C. § 408 (1982). More particularly, carriers must adhere to prescription orders until the Commission approves a different course of conduct. 47 U.S.C. § 205(a) (1982).

[54] *Nader v. FCC*, 520 F.2d at 203-204.

[55] *New England Telephone*, 836 F.2d at 1106, 1107, quoting *Arizona Grocery v. Atchison Ry.*, 284 U.S. 370, 386 (1931).

[56] *New England Telephone*, 826 F.2d at 1106 (emphasis in original).

[57] *See, e.g.*, US West Response to Order to Show Cause, at 18-19 n.51.

[58] *AT & T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription").

[59] *Id.*, 836 F.2d at 1392.

[60] The complaint provisions of the Act make a carrier liable to its customers for damages that result from the carrier's unlawful actions or ommissions. 47 U.S.C. §§ 206-209 (1982). These sections of the Act do not provide a basis for a carrier to file a complaint against its customers. *See Illinois Bell Telephone Company, et al. v. American Telephone and Telegraph Co.*, 4 FCC Rcd. 5268 (1989). In the instant proceeding, US West filed cross-complaints against MCI to recover underearnings. Although MCI is a carrier, the pertinent inquiry for determining the applicability of complaint procedures focuses on the relationship between the complainant and defendant with regard to the action in question. Here, US West is alleging it has been damaged by providing service as a carrier to a customer, MCI. There is no basis for such a complaints under the Act and, therefore, US West's cross-complaints are dismissed.

[61] 47 U.S.C. § 209 (1982).

[62] After noting that the plaintiffs in *AT & T v. FCC* asserted that the refund rule violated the Communications Act, the Constitution, and the Administrative Procedure Act's prohibition of arbitrary and capricious agency action, the court stated: "We find one of these challenges dispositive. We agree that the Commission's refund rule is arbitrary and capricious agency action under the Administrative Procedure Act." *AT & T v. FCC*, 836 F.2d at 1389 (citations deleted).

[63] *Id.*, at 1391-93.

[64] *See Nader v. FCC*, 520 F.2d at 201.

[65] *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, 1180-81 (D.C. Cir. 1987).

[66] *See, e.g., FPC v. Tennessee Gas Pipeline Co.*, 371 U.S. 145, 153 (1962) ("a rate for one class or zone of customers may be found by the Commission to be too low, but the company cannot recoup its losses by making retroactive the higher rate subsequently allowed; on the other hand, when another class or zone of customers is found to be subject to excessive rates and a lower rate is ordered, the company must make refunds to them. The company's losses in the first instance do not justify its illegal gain in the latter."); *TRT Communications v. FCC*, 837 F.2d 1535, 1553 (D.C. Cir. 1988) ("[T]hat a carrier is made subject to refunds or reparation claims, accompanied by a liability for interest, is part of the price it pays for the flexibility in a scheme of carrier-initiated rates. The carrier retains the flexibility to effect a rate increase, but it must account for its increased revenues if those rates are later found to be unlawful."); *see also Communications Satellite Corp. v. FCC*, 611 F.2d 883, 892-94 (D.C. Cir. 1977).

[67] *See Nader v. FCC*, 520 F.2d at 201, 202-203; *MCI Communications Corp. v. FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982).

[68] *See Nader v. FCC*, 520 F.2d at 201.

[69] As described in paragraphs 10-13, *supra*, the Commission in its Rule Making proceeding built safeguards into its prescription to ensure that carriers would have reasonable opportunity to achieve their authorized return while having their rates reviewed at the category level. All of these safeguards provided carriers with substantial flexibility to offset peak and valley earnings, in a manner consistent with the Commission's statutory obligation to prevent discrimination among users of access services. The Commission's decision to provide this flexibility, and the particular manner in which it was provided, are not at issue in the instant complaint proceedings.

[70] *See also Communications Satellite Corporation*, Memorandum Opinion and Order, 3 FCC Rcd 2643 (1988), *aff'd mem., Communications Satellite Corporation v. FCC*, No. 88-1243 (D.C. Cir. Nov. 17, 1989).

[71] See paras. 57-59, *supra*, and notes therein.

[72] MCI Reply at 24 & n.73.

[73] *See, e.g.*, MCI v. Pacific Bell, Order to Show Cause, 4 FCC Rcd 6116, 6117 at n.7 (1987) (emphasis added).

[74] Instead of submitting calculations of the impact on overall earnings of potential damage awards to MCI, US West submitted calculations showing the impact on overall earnings "after capping category returns at 13.25%." US West Response at Appendix B. In other words, US West's submission shows the impact on its earnings that might have resulted if one assumed that all interexchange carriers that took service from US West had filed complaints relating to the period in question. The results filed by US West cannot occur, however, because all such carriers did not file complaints against US West.

For the record, however, the US West submission shows that on a state-by-state basis, which was the geographic level at which its operating companies chose to file tariffs during the period in question, earnings would be affected as follows: Arizona (from 12.26% to 11.91%), Colorado (no change), Idaho-MNT (from 12.85% to 12.17%), Montana (from 12.82% to 12.20%), New Mexico (from 13.16% to 12.56%), Utah (from 12.51% to 12.36%), Wyoming (from 12.63% to 12.23%), Iowa (from 13.61% to 12.90%), Minnesota (from 13.29% to 12.83%), Nebraska (from 13.71% to 12.74%), North Dakota (from 15.19% to 12.81%), South Dakota (no change), Idaho-PNB (from 12.04% to 11.88%), Oregon (from 12.80% to 12.28%), Washington (no change).

[75] *National Assoc. of Reg. Commr's v. FCC*, 737 F.2d 1095, 1120 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1224 (1985).

[76] Wisconsin Bell Response to Order to Show Cause, at 9-16.

[77] *See Nader v. FCC*, 520 F.2d at 199.

[78] *Direct Marketing*, 772 F.2d at 971.

[79] In orders adopted during the year prior to these filings, this Commission established a single, uniform mechanism through which local exchange carriers would recover the cost of providing services needed to originate and terminate interstate and foreign telephone calls. *See MTS and WATS Market Structure*, 93 FCC 2d 241 (*Access Charge Order*), *on reconsideration*, 97 FCC 2d 682 (1983).

[80] *Investigation of Access and Divestiture Related Tariffs*, 97 FCC 2d 1082, 1085 (1984) (*Order Initiating Investigation*).

[81] Our rules explicitly provide an opportunity for public participation in tariff proceedings, and establish specific methods for that participation. *See* 47 C.F.R. § 1.773 (1988).

[82] *See, e.g., Order Initiating Investigation*, 97 FCC 2d at 1083-1084, Appendix A (decisions adopted by Commission based on examination of tariffs, support materials, and comments filed by 55 interested parties).

[83] The defendants cite *Moss v. CAB*, 430 F.2d. 891 (D.C. Cir. 1970), as dispositive, but this is unpersuasive. In that case, the Civil Aeronautic Board, after private meetings with airline representatives, announced that it would accept only tariffs implementing "a detailed formula for determining fares." *Id.*, 430 F.2d at 895. By contrast, this Commission's proceedings were marked by active public participation, and did not result in the adoption of a detailed rate-calculation formula.

[84] 47 U.S.C. §§ 203-204 (1982)

[85] *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 653 (1978). In this case, the Court considered whether the Interstate Commerce Commission (ICC) had prescribed rates for the transportation of North Slope oil. The ICC had suspended the initial tariffs filed by the pipeline owners and calculated "new rates that approximated what full investigation would likely reveal to be lawful rates." 436 U.S. at 637. The ICC stated that it would not suspend interim tariffs which "specified rates no higher than those estimated." *Id.* The Court held that this action did not amount to a prescription of rates.

[86] Pursuant to our rules, the LECs filed access tariff revisions in July 1985, four months after the last order referenced by the defendants. In an order allowing these revisions to take effect, the Common Carrier Bureau specifically referenced the existence of the Part 65 automatic refund mechanism as one reason for not preventing the tariffs from becoming effective. *Annual 1985 Access Tariff Filings*, Mimeo No. 7401, paras. 56-57, released Sept. 30, 1985. Even during the investigation, this Commission indicated that the LECs could file tariff revisions, if they so desired. *See Investigation of Access and Divestiture Related Tariffs*, 102 FCC 2d 1007, 1035-1037 (1985).

[87] *See, e.g.*, US West Response to Order to Show Cause, at 25-26.

[88] Section 415 provides, in pertinent part, that "all complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after . . . ." 47 U.S.C. § 415(b) (1982). The term "overcharges" is defined in Section 415 to mean "charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g) (1982).

[89] *Bunker Ramo Corp.*, 31 FCC 2d 449, 453 (1971).

[90] *Id.*, 31 FCC 2d at 454. Thus, *Atchison, T. & S.F.R. Co. v ICC*, 851 F.2d 1432 (D.C. Cir. 1988), cited by the defendants, is inapposite. In that case, the claimants had sufficient notice of a potential refund claim, but were uncertain of the viability of the claim in view of ongoing litigation. 851 F.2d at 1439.

[91] 47 C.F.R. § 65.600(b) (1987); *see also Amendment of Part 65, Procedures and Methodologies to Establish Reporting Requirements*, CC Docket No. 86-127, Notice of Proposed Rule Making, 51 Fed. Reg. 15020, 15021 at para. 21 (Apr. 22, 1986); *Id.*, Report and Order, 52 Fed. Reg. 273 (Jan. 5, 1987). Carrier reports filed prior to the close of the review period could not be determinative of a carrier's earnings for the period as a whole. The Commission concluded that the quarterly filing on September 30th following the end of the period would provide a carrier sufficient opportunity to make appropriate accounting adjustments and "close its books," so to speak, with regard to the period.

[92] 47 C.F.R. §§ 0.91 and 0.291 (1988).

[93] Contrary to US West's suggestion, Section 0.291(e) does not require that formal complaints be designated for a hearing. Rather, it simply states that if certain formal complaints are to be designated for hearing, such designation must be made by this Commission.

[94] Pub. L. No. 100-594, 102 Stat. 3021 (1988) (to be codified at 47 U.S.C. § 151(c)(1)). *See also* 100 CONG. REC. S.15289 (daily ed. Oct. 7, 1988) (remarks of Senator Inouye) (order concluding investigation initiated by certain complaints "shall be issued by the Commission").

[95] *See* Pub. L. No. 100-594, 102 Stat. 3021 (1988) (to be codified at 47 U.S.C. § 208(b)(2)).

[96] *See Nader v. FCC*, 520 F.2d 182, 199-205 (D.C. Cir. 1975).

[97] *New England Telephone and Telegraph Co. v. FCC*, 826 F.2d at 1106-09; AT&T v. FCC, 836 F.2d at 1392.

[98] *See, e.g.*, Comark Cable Fund III, 100 FCC 2d 1244, *recon. denied*, 103 FCC 2d 600, *temporarily stayed*, 104 FCC 2d 451 (1985), *remanded for clarification sub nom.* Northwestern Indiana Telephone Co. v. FCC, 824 F.2d 1205 (D.C. Cir. 1987), *clarified on remand*, 3 FCC Rcd 3096 (1988), *pet. for review denied*, 872 F.2d 465 (D.C. Cir. 1989), *pet. for rehearing or rehearing en banc denied* (D.C. Cir. June 27, 1989).

[99] *See Northwestern Indiana Telephone Co. v. FCC*, 824 F.2d 1205 (D.C. Cir. 1987).

[100] *See Hughes Sports Network*, 38 FCC 2d 1052, 1054 (1972); *see also Intercambio, Inc.*, 3 FCC Rcd. 7247, 7260 n.49 (1988); *Peoples Telephone Cooperative*, 62 FCC 2d 113, 116 (1976).

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 89-272
37746

In the Matter of	)	
	)	
Amendment of Part 69 of the	)	CC Docket No. 89-2
Commission's Rules Relating to	)	
the Common Line Pool Status of	)	
Local Exchange Carriers Involved	)	
in Mergers or Acquisitions	)	

REPORT AND ORDER

Adopted: August 4, 1989 Released: August 23, 1989

By the Commission:

I. INTRODUCTION

1. On April 1, 1989, fundamental changes in the mandatory common line pooling arrangements that have governed the recovery of the non-traffic-sensitive costs of local exchange carriers (LECs) were implemented pursuant to recommendations that were developed by the Federal/State Joint Board in CC Docket No. 80-286 (Joint Board)[1] and subsequently adopted by this Commission in our NTS Recovery Order, with certain minor modifications in the proposed implementation schedule for subscriber line charge increases.[2] The Joint Board recommendation did not address the effects that a merger or acquisition among LECs could have on the pooling status of surviving LECs, but instead recommended that we address this issue in a separate proceeding.[3]

2. On January 10, 1989, we adopted a Notice of Proposed Rulemaking (Notice)[4] inviting interested persons to comment on specific proposals regarding

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1 See MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 2 FCC Rcd 2324 (1987) (hereinafter Recommended Decision).

2 MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 2 FCC Rcd 2953 (1987), aff'd on recon., 3 FCC Rcd 4543 (1988) (hereinafter NTS Recovery Reconsideration Order), appeal pending sub nom. Public Service Commission of the District of Columbia v. FCC, No. 88-1661 (D.C. Cir. filed Sept 12, 1988).

3 Recommended Decision at n. 194.

4 Amendment of Part 69 of the Commission's Rules Relating to the Common Line Pool

the pooling status of LECs that have been involved in a merger or acquisition.[5] On February 16, 1989, an alternative proposal (Joint Proposal) was filed jointly by the National Rural Telecom Association (NRTA), the National Telephone Cooperative Association, the Organization for the Protection and Advancement of Small Telephone Companies, the United States Telephone Association (USTA), and the National Exchange Carrier Association (hereinafter the Joint Commenters or Joint Comments). Comments were also filed on that date by Contel Corporation (Contel) and the United Telephone System Companies (United). On March 3, 1989, reply comments were filed by Contel, Telephone and Data Systems (TDS), Rochester Telephone Corporation (Rochester), and ALLTEL Corporation (ALLTEL).

3. In this Order, we amend Sections 69.3 and 69.612 of our Rules[6] to specify the effects a merger or acquisition among LECs will have on the access charge plan's revised pooling arrangements. These changes generally adopt the recommendations of the Joint Commenters, subject to certain clarifications. Specifically, we allow LECs involved in mergers or acquisitions to retain their pretransaction pooling status indefinitely. We also adopt a rule which provides that a waiver of Section 69.3(e)(9) is required only if a net addition of more than 50,000 access lines to the NECA common line pool would result from a merger or acquisition. For those waiver requests, we adopt a sixty-day notice requirement, after which the LECs may proceed with the merger or acquisition unless certain events specified infra in paragraph 33 occur. Finally, we accept the Joint Commenters proposal that the 1988 base year data of the merged or acquired LECs be aggregated for calculating future Long Term Support (LTS) and Transitional Support (TRS) amounts. Each of these determinations is subject to the conditions that part of a study area may not be pooled and part nonpooled and that any change in LTS, TRS, or other pool related requirements may be made only on the effective date of the annual common line access tariffs. The rules we adopt in this order are designed to permit LECs to realize efficiencies possible from mergers or acquisitions, without fostering the selective reinsertion of high-cost study areas into the NECA common line pool through the manipulation of the merger or acquisition rules, which could undermine the pooling process.

II. BACKGROUND

4. Under our current rules, any LEC may withdraw from the NECA common line tariff and pool and file common line tariffs based on its own costs, subject to certain conditions. Among these conditions are the "affiliate withdrawal" requirement, which requires LECs choosing to leave the pool and file their own common line tariffs to remove all their study areas, and departing holding companies

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Status of Local Exchange Carriers Involved in Mergers or Acquisitions, 4 FCC Rcd 740 (1989).

5 See infra paras. 6-11.

6 47 C.F.R. § 69.3 and 69.612.

to remove all their affiliated companies.[7] Moreover, once a LEC (or group of affiliated LECs) leaves the NECA common line pool and files its own common line tariff, it may not participate in the NECA common line pool at a later date. Thus, this election opportunity is restricted by a "one-way" requirement.[8]

5. LECs that withdraw from the pool are required to make LTS payments to the NECA common line pool targeted to keep the pooled carrier common line (CCL) rates at the nationwide average level that would have resulted if all LECs had remained in the pool. The Joint Board concluded that this would enable LECs leaving the pool to establish more cost-based CCL rates without adversely affecting the rates charged by the LECs that remain in the pool.[9] In addition, four years of TRS payments are provided to qualifying LECs that withdraw from the pool. In order to qualify for TRS, a LEC must have been a net recipient from the pool in 1988 and must withdraw from the NECA common line tariff and pool in accordance with a specific timetable.[10] TRS is paid by nonpooling LECs that were net contributors to the pool in 1988. LECs receiving TRS are exempted from paying LTS during their TRS transition period.

III. The Notice

6. In addition to serving the four fundamental goals of the access charge proceeding,[11] the Notice stated that any rules in this area should be as neutral as possible in terms of their effect on the underlying business decisions, not adversely affect the marketability of small LECs, and not impede transactions that offer legitimate advantages to the LECs and consumers involved. We also indicated that the approach adopted should not cause, or have the potential to cause, material or unexpected changes in the pooling structure. Finally, we stated that LECs should not be accorded flexibility to an extent that would cause major problems for NECA in administering the common line pool and associated TRS and LTS arrangements, or for this Commission in our review of the LECs' tariff filings.[12] We found that the current rules do not adequately address issues relating to the

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7 Recommended Decision at para. 130.

8 NTS Recovery Reconsideration Order at n. 17.

9 See id. at paras. 100 & 111.

10 In addition to the opportunity that LECs had to withdraw on April 1, 1989, smaller (Level II) LECs may qualify to receive TRS by electing to leave the NECA common line pool by December 31, 1989, effective July 1, 1990. See 47 C.F.R. §§ 69.2(v)-(w); 69.3(e)(9) & 69.612(b). LECs may leave the pool on an annual basis after these dates, but will be ineligible to receive TRS. See 47 C.F.R. § 69.612(b).

11 Those goals are promoting economic efficiency, eliminating pricing discrimination, deterring bypass, and preserving universal service.

12 Notice at paras. 7-9.

pooling status of LECs involved in a merger or acquisition.[13]

7. The Notice discussed a proposal of several LEC industry representatives that a LEC that acquired another LEC with a pooling status different from its own be permitted to determine at its option whether the acquired LEC should retain its current pooling status or convert to the status of its new affiliate(s), subject to a procedure for challenging any election that would have a substantial impact on the LTS obligations of nonpooling LECs.[14] We tentatively concluded that the LEC industry proposal could have a substantial adverse impact on the revenue requirement of the common line pool, and thus on the LTS obligations of nonpooling LECs, because of the ability of LECs to structure transactions to take advantage of the support mechanisms. We also stated that the proposed procedure for challenging transactions was vague and undefined, and incorrectly placed on parties challenging a merger or acquisition the burden of showing that adverse effects would result. Finally, we expressed concern that the proposal's flexibility could result in a substantial number of holding companies having some of their affiliates in, and some out, of the NECA common line pool, thereby possibly complicating NECA's rate calculation and billing functions and our tariff review process, as well as creating undesirable cost allocation incentives for LECs with companies in different pooling positions.[15]

8. The Notice generally addressed situations in which a nonpooling LEC acquires or merges with a pooling LEC, or vice versa.[16] We identified three potential post-transaction pooling scenarios for which we proposed specific treatment: (1) both LECs desire to operate outside the NECA pool; (2) both LECs desire to be included in the NECA common line pool; and (3) each LEC desires to retain its preexisting status. We indicated that the effective date for any change in

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13 Notice at para. 10.

14 See Notice of Ex Parte Meeting between federal Joint Board staff and Counsel to the NRTA and USTA, MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, filed January 14, 1987. Representatives of the USTA Unity I-A Coordinating Committee's Mergers and Acquisitions Subcommittee also discussed this proposal in an ex parte meeting with Commission staff on March 10, 1988. See Letter from M. Humphrey to Acting Secretary, FCC, dated March 10, 1988.

15 Notice at paras. 11-15.

16 The single exception to this is our proposal for treating LTS and TRS payments when two LECs outside the pool are involved in a merger or acquisition. We proposed that if the LECs involved are all LTS and TRS contributors, or all TRS recipients, their new LTS and/or TRS obligations or benefits should be calculated based on the combined 1988 base years of the LECs. If, however, a LEC that is an LTS/TRS contributor acquires or merges with a TRS recipient, we proposed that, for the duration of the transition period, the new LEC continue to make LTS and TRS payments according to the 1988 base year formula of the pretransaction contributor LEC, and continue to receive TRS according to the 1988 base year formula of the pretransaction recipient LEC. Notice at para. 25.

common line pooling status must coincide with the effective date of the annual tariff filing following consummation of the transaction.

9. The Notice indicated that mergers or acquisitions in which the involved LECs desire to operate outside the common line pool after consummation of the transaction are consistent with the existing "affiliate withdrawal" and "one-way" rules and the LTS rules applicable after the TRS transition period. However, we proposed specific rules relating to the LTS and TRS payments that would apply to the new entity or entities outside the pool when the departure from the NECA pool occurred during the transition period.[17] If the nonpooling LEC (Company A) was obligated to pay both LTS and TRS prior to the transaction, we proposed that the new LEC (or affiliated LECs) would be obligated to pay LTS and TRS according to a formula that adds together the 1988 base years of the separate pretransaction LECs. If Company A had been receiving TRS based on its 1988 base year, we proposed that TRS payments not be adjusted to reflect the effect of the merger or acquisition involving Company B (the pooling LEC). Moreover, if Company B had been a net recipient in the NECA pool at the time of its departure, we proposed that the surviving LEC or LECs not be required to pay LTS or TRS during the transition period. However, if Company B had been a net contributor to the pool, we proposed to require the surviving LEC or LECs to pay LTS and TRS based on the 1988 base year of Company B during the transition period. We observed that these procedures come close to maintaining the pretransaction status quo, minimize the impact on the overall pool support structure, protect the interests of small LECs, appear to serve the interests of administrative simplicity, and provide equitable treatment for all concerned.

10. LECs with different pooling positions might also seek to have the LEC outside the pool reenter the pool, either through a merger with the LEC already in the pool or by being acquired as an affiliate of the pooling LEC. We recognized that allowing a LEC that has left the pool to reenter the pool at a later date raises important concerns[18] and is inconsistent with our "no pool reentry" principle; nevertheless, we indicated that it might be appropriate, with certain safeguards, to apply a somewhat less restrictive rule in the circumstances of a merger or acquisition so that LECs would not be unduly deterred from negotiating an otherwise desirable transaction. To protect against adverse impact to the NECA common line pool, and indirectly to the LTS obligations of nonpooling LECs, we proposed that if a nonpooling LEC wishes to reenter the pool because it is involved in a merger or acquisition with a LEC in the pool, it must obtain a waiver from this Commission before it would be allowed to reenter the pool. To obtain such a waiver, LECs would have to demonstrate that the overall pooling structure would not be materially harmed, i.e., the reentry of the nonpooling LEC(s) into the pool would not have a substantial adverse effect on the pool's revenue requirement or significantly

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17 Notice at paras. 19-24.

18 We expressly stated that one of our concerns was that LECs might structure merger or acquisition transactions in ways designed to take advantage of the ability to reenter the NECA common line pool.

increase the LTS and/or TRS obligations of the remaining nonpooling LECs.[19]

11. Finally, a LEC acquiring or merging with another LEC with a different pooling status may desire to have each party to the transaction retain its pretransaction pooling position. We stated that such an option would be inconsistent with the principles underlying the affiliate withdrawal rule and expressed concern that the rules adopted not be used as a vehicle to circumvent this rule. We also expressd concern that an unlimited ability to leave acquired properties in the common line pool could create administrative difficulties for us, as well as NECA. Despite these concerns, we indicated that some flexibility might be appropriate to achieve sufficient neutrality regarding the marketability of LECs. We accordingly proposed as a first option that, when LECs with different pooling positions are involved in an acquisition, those LECs should be permitted to retain their pretransaction pooling positions for a three-year transition period following the consummation of the transaction. After this transition, the rules applicable to mergers or acquisitions in which all the involved LECs leave the pool would apply. Alternatively, we indicated that the acquired LEC could be permitted to remain in the pool as long as its costs exceed a fixed percentage of the nationwide average, e.g., over 150%. We indicated that the flexibility provided by either of these options would help ensure that our rules do not adversely affect the marketability of LECs, while protecting against sudden changes in the pooling structure, reducing manipulation of our pooling requirements, and minimizing the administrative difficulties that would result if LECS were given unlimited flexibility to maintain separate pooling positions for acquired LECs. We tentatively concluded that, of these two alternatives, the three-year "transition period" proposal would best serve the identified goals.[20]

IV. Positions of Parties

A. The Joint Proposal.

12. The Joint Commenters assert that we should allow pooling LECs involved in mergers or acquisitions with nonpooling LECs to continue their pretransaction common line pool status without the limitations proposed in the Notice.[21] They state that this will leave the composition of the pool unaffected, and, therefore, the primary purpose of the affiliate withdrawal rule is not brought into play. The Joint Commenters state that the industry support of Unity I-A did not contemplate that LECs would lose their eligibility for NECA common line pool participation by acquiring, or being acquired by, a nonpooling LEC. They claim that such a consequence would jeopardize the benefits this Commission, the Joint Board, and the industry sought to secure for high-cost LECs and their customers by allowing the choice of continued pooling. They further state that the three-year proposal is not neutral with respect to LEC marketability and could injure the

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19 Notice at paras. 26-29.

20 Notice at paras. 30-35.

21 Joint Comments at 7-9.

ratepaying public. The Joint Commenters state that the Joint Proposal will maintain the existing support flows to high-cost properties without impacting the overall level of support.

13. The Joint Commenters assert that allowing LECs to maintain their pretransaction pool status will not create undue administrative burdens for NECA or this Commission. They note that NECA today is required to develop tariff filings and data submissions for holding companies with multiple tariffing statuses that we are reviewing on a routine basis. Moreover, they submit that most of the costs are incurred when the systems are initially established and state that their proposal best serves our goals.

14. The Joint Commenters also address the situation in which the nonpooling LEC in a merger or acquisition wishes to reenter the pool. They contend that some relaxation of the one-way requirement is desirable so that otherwise sound business decisions will not be deterred, although they posit that the NECA common line pool must be protected from material harm. They believe our proposal to require a waiver of Section 69.3(e)(9) for all transactions in which the parties desire to return the merged or acquired LEC property to the common line pool is overly broad, may deny support that subscribers need, and introduces unnecessary administrative burdens and uncertainties. The Joint Commenters state that the waiver process should be limited to situations in which significant dislocation is possible. Therefore, they propose that a waiver of Section 69.3(e)(9) should only be required if a net addition to the NECA common line tariff of more than 50,000 lines would result,[22] with the burden of demonstrating an acceptable impact placed on the LECs seeking reentry into the pool.[23]

15. Finally, the Joint Commenters propose the use of a consistent methodology for calculating the LTS and TRS payments of nonpooling LECs after mergers and acquisitions occur. The Joint Commenters specifically note the case in which a nonpooling, TRS receiving LEC and a pooling LEC merge and the pooling LEC is removed from the pool. They note that the Notice proposed making no adjustment to the TRS level in that case. This, they assert, could reduce the marketability of small LECs because a high-cost, nonpooling LEC may be unwilling or unable to absorb the additional cost of a pooling LEC. They propose that the 1988 base year data should be adjusted to reflect the changed configurations of the LECs involved, and the LTS and TRS amounts recalculated accordingly. The Joint Commenters state that while this methodology would necessitate minor adjustments to the support levels of nonpooling LECs, other aspects of the proposal would minimize the magnitude of those changes. They assert that this approach provides equitable treatment for all, is administratively less complex than our proposal, best preserves the marketability of small LECs, and directs the support being provided to the subscribers intended to

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22 They state that if the highest cost, nonpooling study area under 50,000 lines were to reenter the common line pool, it would bring an $800,000 support requirement. This amount, they submit, would increase the total LTS by 0.25% and would cause the largest contributor LEC's LTS suppport payment to increase by 0.1%.

23 Joint Comments at 10-12.

be benefited.[24]

B. Other comments.

16. All the parties filing comments support the Joint Proposal. United notes that it and Contel will consummate an exchange of the assets of certain telephone properties on July 1, 1989, and that our action will affect the rates of the traded entities. Rochester states that only a rule permitting an acquired LEC to maintain its pooling status will preserve its value and be neutral with respect to the business decisions involved in a possible acquisition.

17. Contel's ultimate position, as reflected in its reply comments, is that LECs having different pooling statuses that are involved in mergers or acquisitions involving complete study areas should be permitted to maintain their pretransaction pooling statuses indefinitely.[25] It submits that our proposal would place artificial and unjustified limits on corporate or financial structures that could adversely affect the marketability of small LECs without providing any compensating benefits. Contel states that if acquired LECs were allowed to remain in the pool, other LECs' support requirements would not be increased. Moreover, Contel states that this does not present the opportunity for selective withdrawal that was the basis for the all-or-nothing restriction for the initial pool withdrawal elections. Contel agrees with the Joint Commenters that waivers to reenter the pool should only be required when more than 50,000 access lines would be brought back into the pool.

18. Finally, Contel proposes streamlining the waiver process to eliminate unnecessary and costly delays. It recommends an approach similar to that used by the Federal Trade Commission (FTC) and the Department of Justice (DOJ) in analyzing the antitrust implications of mergers and acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act of 1974 (hereinafter Hart- Scott-Rodino Act).[26] Contel states that these procedures have worked satisfactorily and urges

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24 Joint Comments at 12-15.

25 Contel Reply Comments at 4. Contel's comments differentiate among stock acquisitions (transactions that result in the continuation of the acquired entity under new ownership), direct mergers (transactions in which one entity is merged into another), and asset transactions (transactions in which one entity obtains assets of another entity, and the separate legal existence of both entities is left intact). Initially, Contel argued that in the case of an asset transaction or direct merger, the acquired LEC should take on the pooling status of the acquiring LEC. Contel Comments at 4-10.

26 Public Law No. 94-435, 90 Stat. 1383 (1986). Under that Act, parties to a definitive purchase agreement are required to file an application with the FTC and the DOJ that provides certain data concerning the involved entities. If the FTC or the DOJ do not request further information, or notify the parties of potential problems, within thirty days of the receipt of the application, the parties are free to close the transaction in question.

us to adopt a thirty-day notice procedure for mergers and acquisitions requiring the filing of a waiver request. Contel states that the thirty-day period would not be applicable if we requested additional information or time. Contel's proposal would, however, allow LECs to consummate transactions prior to the expiration of the thirty-day period with the understanding that the LECs were assuming the risk that the waiver might not be granted and the LEC(s) that desired to reenter the pool would not be allowed to do so.

19. ALLTEL generally supports the Joint Comments, noting its view that the 50,000 line threshold level for readmittance to the pool is overly conservative. ALLTEL opposes the imposition of any restrictions on the ability of a LEC to remain in the pool after a merger or combination with a LEC or properties outside the pool. ALLTEL states that we apparently assumed that such transactions constituted a threat to the goals behind the affiliate withdrawal requirement. It asserts that this assumption is flawed, stating that pooling and nonpooling LECs can coexist under the same holding company umbrella since the operating entity for pooling purposes is the study area, not the corporation. Therefore, it submits that as long as the study area is not split by being partially in or out of the pool, there should be no administrative problem in having both pooled and nonpooled study areas in the same corporate structure.

20. ALLTEL also argues that concerns about potential cost shifting are overstated because very few costs in its case are joint or common and thus allocated among study areas. It submits that the allocation of costs could be adequately controlled through nonstructural safeguards. Finally, ALLTEL states that the affiliate withdrawal rule was intended to prevent a holding company from withdrawing only its low-cost LECs from the pool, leaving the higher-cost affiliates to be supported by the pool. It suggests that that purpose has been achieved, and that any LEC or study area still in the pool has a right to be there, consistent with the public interest. ALLTEL claims that nothing in the affiliate withdrawal rule should require a LEC in the pool to leave it upon being acquired by, or acquiring, another LEC because there is no element of choice arising out of the transaction that would operate to skew the membership towards high-cost LECs.

21. TDS supports the Joint Proposal, stating that a reasonable opportunity for pool reentry and the ability to maintain the preexisting pool status of the acquiring and acquired LEC is essential to protect subscribers and LECs. It emphasizes that the Notice's proposal could undermine the pool modifications that became effective on April 1, 1989. TDS asserts that the Unity I-A agreement did not contemplate that the all-in or all-out rule would be used to impede future acquisitions or mergers supported by sound business reasons. TDS submits that adoption of our proposal could force LECs that have elected to remain in the NECA common line pool to forego beneficial mergers and acquisitions, or risk across-the-board ineligibility for participation in NECA's common line pool. Moreover, it states that denial of pool eligibility would cause an average schedule LEC to lose that status. TDS asserts that denial of average schedule status based on affiliation runs afoul of the ALLTEL decision.[27] TDS also asserts that allowing a

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2/ ALLTEL Corporation v.FCC, 838 F.2d 551 (D.C. Cir. 1988). In this case, the court remanded to this Commission for further consideration a rule that required

LEC to maintain its preacquisition status leaves the pool unchanged, and, thus, the rules proposed in the Notice are not needed to protect against harmful increases in the size of nonpooling LECs' LTS obligations to the pool. Finally, TDS states that cost shifting is not a concern because of regulatory prohibitions and supervision and indicates that the NECA traffic-sensitive pool has functioned well with commonly owned study areas both inside and outside the pool.

V. Discussion

22. On April 1, 1989, a fundamentally different regulatory structure replaced a framework that for nearly five years had provided common line exchange access service to interexchange carriers through mandatory, nationally averaged pooled common line charges.[28] The new regulatory structure allows LECs to elect to leave the NECA common line pool and file common line tariffs of their own, subject to certain conditions, and institutes a system of LTS and TRS payments, as discussed above. Common line access tariffs of those LECs that left the NECA common line pool and associated tariff became effective on April 1, 1989.

23. An integral part of the implementation of this new regulatory procedure for the tariffing of common line access by LECs included the requirement that LECs electing to leave the NECA common line pool must withdraw all of their study areas from the pool and that holding companies must withdraw all of their affiliates.[29] As the Joint Board and this Commission reasoned in recommending the new procedure, a contrary approach would likely cause LECs to remove only their low-cost study areas, while leaving high-cost areas in the pool, and might establish improper incentives relating to the allocation of common costs between study areas in the pool and those that are withdrawn. The two orders concluded that unless a significant number of LECs withdrew their high- and low-cost companies, only an administrative change in the pooling process would result.[30] Thus, the affiliate withdrawal rule was deemed an essential element in the success of the new procedures.

24. LECs providing the vast majority of the nation's access lines have already withdrawn from the pool.[31] There is, however, still a second election date for smaller companies that wish to receive TRS, and, of course, LECs may leave the pool on annual election dates after that time with no provision for TRS. With the

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affiliated LECs to be either all average schedule companies or all cost companies.

28 See supra paras. 4-5.

29 This requirement applies irrespective of whether it is leaving on one of the first two annual departure dates or at any later annual date.

30 See Recommended Decision at para. 130; see also NTS Recovery Reconsideration Order at paras. 47-58.

31 See Letter from M. Humphrey, counsel for NRTA, to Ms. D. Searcy, Secretary, FCC, dated February 23, 1989.

initial regulatory transformation from a mandatory pooling of common line charges to an environment in which individual LECs may elect to file their own common line charges largely completed, we must now examine issues related to the treatment of the business or asset realignments among LECs that occur as a result of mergers and acquisitions.[32] These issues relate to the effect of mergers and acquisitions among LECs on the rules governing the pooling process, including the rights and responsibilities associated with LTS and TRS payments. These transactions are typically related to operating or investment objectives of the involved LECs as contrasted with changes resulting from modifications to regulatory requirements. Thus, as the commenting parties have urged, we focus on the efficiency and cost-saving opportunities offered by mergers and acquisitions and seek to avoid creating regulatory obstacles or disincentives to mergers or acquisitions that offer public interest benefits. However, we remain mindful of the concerns expressed in the Notice about the use by LECs of additional flexibility in the merger and acquisition area as a means to manipulate the rules in a manner that would undermine the revised pooling procedures.

25. Below, we address the three merger or acquisition scenarios among LECs with different pooling positions identified in the Notice for which we proposed specific treatment: (1) the surviving LEC(s) desire to operate outside the pool, (2) the surviving LEC(s) desire to operate within the NECA common line pool, or (3) the involved LECs desire to retain their pretransaction common line pooling status. In conjunction with the first scenario, we discuss the regulatory treatment of a merger or acquisition among nonpooling LECs. Finally, we discuss a few general matters relating to mergers and acquisitions.[33]

A. Merger or acquisition in which all LECs desire to be outside the pool.

26. The Notice contemplated that LECs with different pooling statuses might desire to operate outside the NECA common line pool after a merger or acquisition. Such an operating arrangement is consistent with Part 69 of our rules. However, the Notice recognized that clarification of the LTS and TRS rules was needed as they applied to LECs involved in mergers or acquisitions during the four-year transition period during which TRS payments are required of some

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32 The Notice at note 16 proposed to treat exchanges of properties among LECs as if separate acquisitions were occurring and inquired whether any different rules were needed for exchanges of properties among LECs. No party commented on this matter. Therefore, we shall treat exchanges of properties among LECs as proposed in the Notice. Furthermore, we find no reason to adopt any different rules for exchanges of properties among LECs. We note that for purposes of determining if a waiver is required in connection with bringing additional access lines into the NECA common line pool, a netting of the access lines entering and leaving the pool should be made. For this purpose, the LEC must seek the same treatment for all of the properties acquired, i.e., a LEC may not bring some properties acquired in a transaction into the pool, while leaving other properties outside the pool.

33 For ease of reference, we use merger or acquisition of a LEC to include all of the LEC, or of one or more study areas of a LEC, unless the context otherwise indicates.

nonpooling LECs. Accordingly, as described in greater detail in paragraph 9, supra, we proposed a framework for the LTS and TRS rules that depended on the combination of contributor/receiver status of the LECs involved in the merger or acquisition. However, the Joint Commenters, as described more fully in paragraph 15, supra, proposed that the 1988 base year data of the involved LECs simply be adjusted to reflect the changed configurations of the LECs involved in the merger or acquisition, and the LTS and TRS amounts recalculated accordingly.

27. After reviewing the record in this proceeding, we conclude that the Joint Proposal's unopposed plan to adjust the 1988 base year data of the involved LECs to reflect the changed configurations of LECs involved in mergers or acquisitions and to recalculate the LTS and TRS amounts will produce a more equitable result and will be easier for NECA to administer. Our proposal did not always take into account the acquired pooling LEC's 1988 base year position when determining the level of TRS payments a nonpooling LEC could receive after a merger or acquisition, e.g., our proposal not to adjust TRS payments when a nonpooling, TRS recipient merged with a pooling LEC and removed the operations from the pool. While the Joint Commenters' proposal in this area will cause some small shifts in the amount of support any one LEC may have to pay, it appears from the record that any shift that might occur would not materially affect the support payments of any LEC not involved in the transaction.[34] In fact, the results will be more equitable to all involved in the LTS and TRS process for two reasons. First, the relative high- or low-cost nature of the pooled LEC compared to the cost level of the nonpooling LEC results in the LTS and TRS payments or TRS receipts of the nonpooling LEC reflecting the cost pattern of the pool LEC.[35] Second, if the pooling LEC is a high-cost LEC, as is frequently the case, that LEC will no longer be a factor in determining the amount of LTS required by the NECA common line pool, which will reduce the total LTS required to support the pool.

28. We recognize that the Joint Proposal will permit study areas of pooling LECs that are involved in mergers or acquisitions to be included in a nonpooling LEC's 1988 base year data and thus effectively receive TRS payments for the remaining one, two, or three years that the nonpooling LEC may be eligible to receive TRS payments. This result is not inequitable since we do not expect substantial support dollars to be affected. For example, in many cases, the study area, since it has elected to stay in the pool, may likely be a high-cost study area which requires a higher LTS payment from nonpooling LECs. Thus, if that LEC were to leave the pool, the LTS requirement would be reduced and replaced with a smaller, declining TRS payment.

29. Finally, the Joint Commenters, one of whom is NECA, indicate that the difficulty of administering the LTS and TRS programs will be reduced if the Joint Proposal is adopted. Therefore, we will adopt the Joint Proposal's approach for combining the 1988 base year data for LECs involved in mergers or acquisitions in

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34 Joint Comments at 15.

35 Thus, a nonpooling LEC that acquires a higher cost pooling LEC will have its LTS and TRS obligations reduced, or its TRS receipts increased to reflect the acquisition.

which the surviving LEC(s) operate outside the NECA common line pool. We will also apply this adjustment to those mergers and acquisitions among nonpooling LECs irrespective of whether both LECs are contributors or receivers, or whether one LEC pays LTS and TRS and the other receives TRS. This will harmonize the treatment of all mergers and acquisitions in which the surviving LEC(s) operate outside the NECA common line pool.

B. The surviving LEC(s) desire to operate within the NECA common line pool.

30. The second scenario involves LECs with different pooling positions in which the nonpooling LEC seeks to reenter the pool, either through a merger with a LEC already in the pool or by being acquired as an affiliate of a pooling LEC.[36] As outlined more fully in paragraph 10, supra, we proposed that a waiver would be required before a LEC in such a situation would be allowed to reenter the pool. The Joint Commenters believe the waiver process should be limited to situations in which significant dislocation is possible. They propose that a waiver of Section 69.3(e)(9) should only be required if a net addition to the NECA common line pool and tariff of more than 50,000 lines would result from the transaction.

31. After reviewing the record, we conclude that our proposal to require a waiver whenever a LEC proposes to have a nonpooling LEC reenter the NECA common line pool as a result of a merger or acquisition would be overly restrictive. As we noted in the Notice, this is an area in which some flexibility could enable the acquiring or surviving LECs to consolidate its operations and to take advantage of the benefits of participation in the NECA common line pool and tariff if that is deemed best for the LEC and its customers.[37] We conclude that a waiver should only be required if significant dislocation is possible, as suggested by the Joint Commenters. According to the Joint Commenters, if the highest cost, nonpooling study area under 50,000 access lines were to reenter the NECA common line pool, the LTS requirement would only be increased by $800,000, which would increase the total LTS by 0.25% and would cause the largest contributor LEC's LTS payment to increase by 0.1%.[38] The Joint Comments have persuaded us that transactions that bring 50,000 or fewer access lines back into the NECA common line pool will have a deminimus impact on the pool. Since mergers and acquisitions are events that occur relatively infrequently, and because we expect that mergers and acquisitions will cause LECs to move out of the pool, as much or more than, into the common line pool, the effect of any aggregation of mergers and acquisitions should also not materially affect the pooling process. If, however, future developments indicate a gradual but pronounced trend of movement into the pool, we may of course wish to revisit this

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36 If a pooling LEC merges with or acquires another pooling LEC, the surviving LEC(s) would not have the option to change their pooling status except pursuant to our existing rules. If a nonpooling LEC merges or acquires another nonpooling LEC, the surviving LEC(s) could not reenter the pool.

37 Notice at para. 26.

38 Joint Comments at 12 n. 13.

decision.[39] We therefore adopt the Joint Proposal's position that a waiver should only be required when the transaction would result in a net addition of more than 50,000 access lines to the NECA common line pool. This will reduce the uncertainty associated with mergers or acquisitions that clearly would have little impact on the pool and will reduce the paperwork involved in completing a merger or acquisition transaction. This should benefit the LECs and the consumer, without having an adverse impact on the administration of NECA's common line pool functions.

32. Those mergers or acquisitions in which more than 50,000 access lines would reenter the NECA common line pool require a waiver under both our approach and that of the Joint Commenters. Furthermore, under either approach, the involved LECs would have the burden of demonstrating that an adverse impact would not occur. The Notice indicated that in order to obtain a waiver, LECs would have to demonstrate that the overall pooling structure would not be materially harmed. Specifically, the petitioning LECs would have to show that the reentry of the nonpooling LEC(s) into the pool would not have a substantial adverse effect on the pool's revenue requirement and would not significantly increase the LTS and/or TRS obligations of the remaining nonpooling LECs. No party commenting in this proceeding addressed the waiver standard beyond indicating that the burden would be on the petitioning LECs. Since the Joint Comments and the comments supporting it all recognized that a waiver would be required in some cases before reentry to the NECA common line pool would be allowed, we take their silence on the standard issue as concurrence with the standard we proposed. Accordingly, we find the waiver standards proposed in the Notice appropriate for those mergers and acquisitions proposing that more than 50,000 access lines be allowed to reenter the NECA common line pool. We do not specify any particular format for the waiver petition. However, it should clearly identify the involved properties, including information at the study area level, and should specify the anticipated impact on the revenue requirement for the NECA common line pool and the level of the LTS and TRS payments of nonpooling LECs.[40] Finally, we delegate to the Chief of the Common Carrier Bureau the authority to act on the waiver requests.

33. Contel proposes streamlining the waiver process through the use of a thirty-day notice procedure similar to that used by the FTC and the DOJ in

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[39] Information on material changes will be included in the Form M reports filed by subject carriers. Furthermore, mergers and acquisitions in which partial study areas are involved will come to our attention through the Part 36 waiver process. Finally, to aid us in our monitoring of the effects of mergers and acquisitions, we expect NECA to include in its support materials for its annual common line tariff filing information on the mergers and acquisitions that shifted properties in or out of the pool during the preceding year and their effect on the NECA common line pool's revenue requirement and the LTS and TRS payments of nonpooling LECs.

[40] No party has identified any special confidentiality issues relating to the data required to support a waiver request. Accordingly, the normal confidentiality rules applicable to Freedom of Information Act requests will apply. 47 C.F.R. § 1.459. However, a LEC requesting confidential treatment for some information associated with its waiver request may not avail itself of the sixty-day notice procedure discussed in paragraph 33.

analyzing the antitrust implications of mergers and acquisitions under the Hart-Scott-Rodino Act.[41] The concept of a notice period similar to that in the Hart-Scott-Rodino Act offers some administrative savings to this agency and offers an important planning horizon for the involved LECs. We adopt a plan along the lines proposed by Contel. As noted earlier, telephone companies involved in mergers or acquisitions that wish to have more than 50,000 common lines reenter the NECA common line pool must request a waiver of Section 69.3(e)(9) of our rules. A thirty-day notice period, as proposed by Contel, would be too short since we intend to invite public comment on all waiver requests before we make a final decision on the waiver request. We find sixty days from the public notice of the waiver request to be more compatible with our procedures.[42] Accordingly, the waiver request will be deemed granted on the sixty-first day from the day of public notice inviting comment on the requested waiver unless: (1) we reject the waiver request prior to the expiration of the sixty-day period; (2) we request additional time or information to process the waiver application; or (3) a party, in a timely manner, opposes a waiver request or seeks conditional approval of the waiver in response to our public notice of the waiver request. The adoption of this notice procedure does not alter the burden that the LECs involved in the merger or acquisition have to demonstrate that the overall pooling structure would not be materially harmed if the merger or acquisition were to be approved. Furthermore, the notice procedure shall not be available to the LECs involved in the transaction if the merger or acquisition involves the exchange of a partial study area for which a waiver of a frozen study area is required under Part 36 of our rules. In that case, any waiver of Part 69 of our rules that is required in conjunction with a merger or acquisition should be requested as a part of the Part 36 waiver request and will be responded to in that proceeding. Finally, the notice procedure shall not be available if the waiver includes a request for confidentiality of some or all of the materials supporting the request, or the waiver includes a request to return only a portion of the telephone properties involved in the transaction to the NECA common line tariff.

34. We note that this flexibility is designed to permit uniformity of regulatory treatment. Thus, it is the intention here to permit LECs to reenter the pool to consolidate their operations under one set of regulatory rules. It is not our intention that LECs be permitted to reinsert in the pool selected study areas or affiliates merely as a result of the acquisitions of a single pooling LEC, i.e., the LECs involved in the merger or acquisition may not decide to have only part of the nonpooling properties included in the merger or acquisition reenter the pool. Such a result could invite substantial manipulation of the rules and undermine the pooling process.

C. The involved LECs desire to retain their pretransaction common line pooling

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41 See supra. para. 17.

42 This slightly longer time period should not adversely affect the majority of mergers or acquisitions. The LECs involved in the transaction may of course seek expedited consideration if that length of time is unworkable. Any expedited request should bear in mind that we do not intend to waive the opportunity for meaningful public comment prior to acting on a waiver request.

status.

35. The final merger or acquisition arrangement to be considered involves a LEC acquiring, or merging with, another LEC with a different pooling status in which the LECs desire to retain their pretransaction pooling positions. The Notice proposed that when LECs with different pooling positions are involved in an acquisition, those LECs should be permitted to retain their pretransaction pooling positions for a three-year transition period following the consummation of the transaction, after which the rules applicable to mergers or acquisitions in which the involved LECs leave the pool would apply. Alternatively, we indicated that the acquired LEC could be permitted to remain in the pool as long as its costs exceed a fixed percentage of the nationwide average, e.g., over 150%. As detailed more fully in paragraphs 12 and 13, supra, the Joint Commenters urge that we allow pooling LECs involved in mergers or acquisitions with nonpooling LECs to continue their pretransaction common line pool status without the limitations proposed in the Notice.

36. As discussed above, the Notice identified several criteria for evaluating alternative proposals.[43] Evaluated by these objectives, the proposals before us offer different incentives to LECs contemplating a merger or acquisition.[44]

37. The Joint Proposal's approach which would allow LECs to maintain their pretransaction pooling statuses is clearly the most neutral and preserves LEC marketability to the maximum extent because it does not impose regulatory consequences as a result of the merger or acquisition. Rochester states that a rule will be neutral with respect to the business decisions involved in a possible acquisition and will preserve the value of an acquired LEC only if the acquired LEC is permitted to maintain its pooling status. The ability to leave a pooling LEC in the pool will also ensure that no adverse effects result to the CCL rate of the acquiring or acquired LEC. The three- year option would provide some relief to the acquiring LEC during the process of absorbing the acquired pooling LEC and realizing any cost savings possible from consolidated operation. However, since the benefit would be lost after three years, it is, as the Joint Commenters assert, not pooling neutral and could adversely affect the marketability of LECs receiving substantial benefits from pool participation. For example, if a high-cost pooling LEC were required to leave the pool in a merger or acquisition, the CCL rate of the acquired or acquiring LEC, and the amount of the LTS payments that the combined LEC would have to pay after the transition period, might be raised, thereby making acquisitions of high-cost pooling LECs less attractive. We believe, and the record supports, that mergers and acquisitions can introduce greater efficiencies and economies in the provision of local exchange service. Thus, we seek to avoid a structure whereby a pooling LEC might not acquire a neighboring nonpooling LEC that offered sound

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43 See supra para. 6.

44 Whether these incentives by themselves would be determinative of whether a merger or acquisition would take place cannot be stated with certainty. Many factors enter the decision-making process, perhaps most significantly tax considerations.

business opportunities, and potential public interest benefits, if it meant that the pooling LEC would have to leave the pool at some point.

38. After carefully reviewing the incentives, and weighing them against the objectives of this proceeding, we conclude that allowing LECs to maintain their pretransaction pooling positions will best serve the public interest.[45] As the parties stress, this will not result in any increase in the support amount required for the NECA common line pool since no LECs will be reentering the pool under this scenario.[46] Furthermore, the commenting parties, including NECA which will bear important administrative functions, assure us that the Joint Proposal does not present administrative problems in its implementation.[47]

39. The Notice expressed the view that allowing LECs to maintain their pretransaction pooling positions when they were involved in a merger or acquisition would be inconsistent with the principles underlying the affiliate withdrawal rule and expressed concern that the rules adopted not be used as a vehicle to circumvent this rule. However, the Notice indicated that some flexibility might be appropriate to achieve sufficient neutrality regarding the marketability of LECs.

40. The comments strenuously assert that the affiliate withdrawal rule is not implicated by their merger or acquisition proposal. The Joint Commenters and TDS assert that the industry support of Unity I-A did not contemplate that LECs would lose their eligibility for NECA common line pool participation by acquiring a nonpooling LEC or being denied the opportunity to elect to maintain the status quo relative to NECA tariff participation. Contel and ALLTEL state that allowing LECs to retain their pretransaction pooling positions does not present the opportunity for selective withdrawal that was the basis for the all or nothing restriction for the initial pool withdrawal elections.

41. The affiliate withdrawal rule assures that the benefits of the policy modifications are not substantially undermined by selective withdrawal from the pool in connection with the departure of a LEC from the pool.[48] The Joint Commenters, however, assert that applying the affiliate withdrawal rule in a manner that denies LECs the ability to maintain their pretransaction pooling statuses in

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45 The record does not contain any information or comment relating to our alternative proposal to use a cost-level criteria, such as 150% of a national average cost, to determine which LECs might remain in the NECA common line pool after a merger or acquisition. Given that fact, and because we have concluded that the proposal offered by the Joint Commenters reasonably serves our various goals, we need not address that alternative.

46 The Joint Commenters, Contel, and TDS state that if acquired LECs were allowed to remain in the pool, other LECs' support requirements would not be increased.

47 We note that if this option is selected, the involved LECs are not free to remove some study areas from the pool, while leaving others in the pool, or to return study areas of the nonpooling LEC to the pool.

48 Recommended Decision at para. 130; Notice at para. 35.

the merger and acquisition context would jeopardize the benefits this Commission, the Joint Board, and the industry sought to secure for high-cost LECs and their customers by allowing the choice of continued pooling. The record indicates that the incentives underlying mergers and acquisitions, i.e., operating efficiencies or investment decisions, are different from those that would be associated with a LEC contemplating departure from the pool in the absence of the affiliate withdrawal rule, i.e., selective withdrawal of low-cost study areas or LECs. Because the LECs who select this option may not shift any study areas into or out of the pool, the potential for selective abuse of the pooling process is greatly diminished, making the possibility of undermining the pooling process speculative. As the primary purpose of the affiliate withdrawal rule is to avoid selective withdrawal, and not to prevent efficiency-enhancing mergers and acquisitions, and because our proposal might impose impediments to efficiency-enhancing mergers and acquisitions which can bring noticeable public interest benefits; accordingly, we amend Section 69.3 to provide for the possibility of LEC continued participation indefinitely in the NECA common line pool after a merger or acquisition.

D. General matters

42. The Notice proposed that any changes to the LTS or TRS payments could occur only on the date the annual access charge tariff filings become effective. No party questioned this procedure for handling the timing of the changes resulting from mergers and acquisitions. Without such a rule, the administration of the LTS and TRS programs under the revised pooling arrangements would be extremely complex. We therefore adopt it for all pooling changes resulting from such transactions, incorporating it in Section 69.3(e).

43. A second matter of general applicability raised in the comments relates to the treatment of mergers or acquisitions involving partial study areas. ALLTEL observes that the study area is the operating entity for pooling purposes and asserts that, if a study area is not split by being partially in or out of the pool, there should be no administrative problem in having both pooled and nonpooled study areas in the same corporate structure.[49] Contel's proposal refers to transactions involving entire study areas.[50] Several of the parties commenting thus view the study area as important in their assessment of the mergers and acquisition issues.

44. The study area is a basic construct of our regulatory structure and forms the basic cost center of the separations procedures. Study areas have been frozen at their November 15, 1984, boundaries.[51] Section 69.3(e)(7) of our rules

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49 ALLTEL Reply Comments at 3.

50 Contel Reply Comments at 4.

51 MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 50 Fed. Reg. 939 (Jan. 8, 1985). The regulatory concern underlying the decision to freeze study area boundaries was the prevention of the abuse of regulatory programs providing benefits to LECs possessing certain characteristics.

also addresses the use of the study area for regulatory purposes. It provides that a tariff shall not contain charges for any access elements that are disaggreggated or deaveraged within a study area that is used for purposes of jurisdictional separations. Given the importance of study areas to our regulatory framework, the rules we adopt in this proceeding relate only to complete study areas.[52]

45. Finally, the Notice observed that the LTS rules applicable after the transition period for TRS accommodate mergers and acquisitions adequately. No party commenting has questioned this conclusion. Therefore, no action is required relating to the LTS rules applicable after the TRS transition period.

VI. Procedural Matters and Ordering Clauses

46. The rules contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements that are applicable to the public, and will not increase or decrease burden hours on the public.

47. We certify that the requirements contained in the Regulatory Flexibility Act[53] are not applicable to the rules we are adopting in this proceeding.[54]

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52 A complete study area could, however, include a redefined study area if it is approved pursuant to a waiver proceeding under Part 36 to alter the boundaries of a frozen study area. Any merger or acquisition that involves a partial study area would require such regulatory approval of any revised study area boundaries. Of course, if a partial study area is involved in a merger or acquisition, adjustments to the 1988 base year data to reflect the transaction will be necessary to ensure that LTS and TRS amounts are properly calculated. This matter may be addressed in the Part 36 waiver proceeding.

53 5 U.S.C. §§ 601-612.

54 In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of this Report and Order in the Federal Register. Because of the nature of local exchange and access services, we have concluded that small telephone companies are dominant in their field of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. See MTS and WATS Market Structure, 93 FCC 2d 241, 338-89 (1983). Thus, we are not required by the terms of that Act to apply the formal procedures set forth therein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate procedures to analyze the effect of proposed regulations on small telephone companies. As part of our analysis of the rules adopted in this Order, we have considered the impact on small telephone companies, i.e., those serving 50,000 or fewer access lines. The rules we adopt will not have an adverse effect on those

48. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 1, 4(i)-(j), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), and 403, and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, that Part 69 of this Commission's Rules IS AMENDED as set forth in Appendix A.

49. IT IS FURTHER ORDERED, that the Chief, Common Carrier Bureau, IS DELEGATED the authority to rule on the waiver requests described herein.

50. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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companies and should benefit such carriers through increased flexibility in common line pooling arrangements in the context of merger and acquisition activity.

Appendix A

Part 69-Access Charges of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 69.3(e) is amended by adding the following new subsection (11):

(11) Any changes in Association common line tariff participation and Long Term and Transitional Suppport resulting from the merger or acquisition of telephone properties are to be made effective on the next annual access tariff filing erfective date following consummation of the merger or acquisition transaction, in accordance with the provisions of Section 69.3(e)(9).

2. Section 69.3 is amended by adding the following new subsection (g):

(g) The following rules apply to telephone company participation in the Association common line pool for telephone companies involved in a merger or acquisition.

(1) Notwithstanding the requirements of Section 69.3(e)(9), any Association common line tariff participant that is party to a merger or acquisition may continue to participate in the Association common line tariff.

(2) Notwithstanding the requirements of Section 69.3(e)(9), any Association common line tariff participant that is party to a merger or acquisition may include other telephone properties involved in the transaction in the Association common line tariff, provided that the net addition of common lines to the Association common line tariff resulting from the transaction is not greater than 50,000, and provided further that, if any common lines involved in a merger or acquisition are returned to the Association common line tariff, all of the common lines involved in the merger or acquisition must be returned to the Association common line tariff.

(3) Telephone companies involved in mergers or acquisitions that wish to have more than 50,000 common lines reenter the Association common line pool must request a waiver ot section 69.3(e)(9). If the telephone company has met all other legal obligations, the waiver request will be deemed granted on the sixty-first (61st) day from the date of public notice inviting comment on the requested waiver unless:

(a) the merger or acquisition involves one or more partial study areas;

(b) the waiver includes a request for confidentiality of some or all of the materials supporting the request;

(c) the waiver includes a request to return only a portion of the telephone properties involved in the transaction to the Association common line tariff;

(d) the Commission rejects the waiver request prior to the expiration of the sixty-day period;

(e) the Commission requests additional time or information to process the waiver application prior to the expiration of the sixty-day period;or

(f) a party, in a timely manner, opposes a waiver request or seeks conditional approval of the waiver in response to our public notice of the waiver

request.

3. Section 69.612 is amended by adding the following new subsection (c):

(c) Long Term and Transitional Support shall be modified to take into account mergers and acquisitions on a prospective basis. The Association shall adjust the 1988 base year data of the surviving entity or entities of any merger or acquisition to reflect the changes effected by the merger or acquisition before calculating the Long Term and Transitional Support amounts pursuant to Section 69.612(a) and (b). For this purpose, the Association shall assume that the transaction occurred prior to 1988.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

		FCC 89-31
In the Matter of	)	37593
	)	
Annual 1985 Access Tariff Filings	)	CC Docket No. 86-125, Phase I

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 1989; Released: February 3, 1989

By the Commission:

I. INTRODUCTION

1. In its October 5 Order [1] the Common Carrier Bureau (the Bureau) determined that separations procedures followed by Ohio Bell that apparently resulted in the recovery of certain investment and expenses under both state and interstate rates had not been satisfactorily explained by Ameritech as requested by the Bureau in its Designation Order. [2] The Bureau therefore disallowed Ohio Bell expenses in the amount of $9.1 million, and investment in the amount of $28.7 million. October 5 Order at paras. 8-9 and Appendix B at 1-6. The Ameritech Operating Companies (Ameritech) filed a petition for reconsideration of the portions of the October 5 Order that relate to Ohio Bell. No oppositions have been filed.

I. BACKGROUND and PLEADINGS

2. The disallowances ordered by the Bureau arose from the comparison of jurisdictional separations factors used in state and interstate access tariffs. Left unexplained, the results of this analysis indicated the duplicative recovery of certain investment and expense items. The October 5 Order noted that Ohio Bell's direct case:

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1 Annual 1985 Access Tariff Filings, Memorandum Opinion and Order, DA 88-1568, released Oct. 5, 1988 (October 5 Order).

2 Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase I, Order Designating Issues for Investigation, 51 Fed. Reg. 16744, May 6, 1986 (Designation Order).

> ...essentially consists of generic efforts to distinguish the state and [interstate] access contexts, often lacking the supporting particulars sought by the Designation Order. This is particularly problematic with respect to the substantial adjustments to "circuit equipment" accounts that, if accepted, would resolve the apparent overrecovery -- but which are explained only by conclusory language, and unsupported by any quantification of the basis for the adjustment.

October 5 Order, Appendix B at 5, note omitted.

3. The Ameritech petition for reconsideration provides a more detailed explanation of the differences between the tariff filings than the prior Ameritech pleadings. Ameritech contends that none of the disallowances were warranted because each challenged revenue requirement computation was correct. Alternatively, Ameritech contends that Ohio Bell should not be required to refund any amounts that may be disallowed from the original revenue requirement computation because Ohio Bell's actual interstate access rate of return for the October 1985-December 1986 period was less than the rate of return authorized by this Commission.

4. The Ameritech petition explains that the differences in circuit equipment expense and investment computation in the state and federal filings are attributable to two factors. Ohio Bell included equipment used to provide facilities to AT&T pursuant to Shared Network Facility Agreements (SNFAs) in the development of separation factors used in the state filing and excluded those SNFA facilities in the development of separations factors that were used to compute interstate access rates. 3 This accounts for

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3 The creation of SNFAs as a consequence of divestiture reflected the divestiture court's determination that the substantial circuit equipment used to provide both intraexchange and interexchange service in the integrated Bell System could not be functionally separated between AT&T and the divested Bell Operating Companies (BOCs), and that wasteful duplication of facilities would be required to maintain service at pre-divestiture levels if the use of existing facilities were limited to either AT&T or the relevant BOC. Accordingly, while the court divided ownership of these facilities between AT&T and the several BOCs, the carrier denied ownership interest in a particular facility retained the right to contract for temporary use of the facilities under SNFAs. While such arrangements are of declining importance, they still have the potential to significantly affect rate development. See generally, Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, FCC 86-52 released Jan. 24, 1986, paras. 44-59, remanded, MCI v. FCC, 842 F.2d 1296 (D.C. Cir. 1988); United States v. AT&T, 552 F. Supp. 131,

$3.014 million of the $9.1 million expense disallowance and $12.953 million of the $28.7 million net investment disallowance. Petition Attachment A at 5. Ameritech also used different Message Minute Miles (MMM) factors which were produced by different basic separations studies to develop separations factors that were used in the state and interstate tariff filings. The difference in MMM factors accounts for $4.837 million of the $9.1 million expense disallowance and $14.212 million of the $28.7 million net investment disallowance. Petition Attachment A at 5.

5. Ameritech apparently contends that Ohio Bell acted properly by including SNFA investment and expense in the separations factors used to derive state revenue requirements and excluding such investment and expense in the development of separations factors used to derive interstate revenue requirements. The Ameritech petition states (Petition at 5):

> SNFA amounts were included in the state revenue requirements. Pursuant to the Commission's separations rules (47 C.F.R. 36.2(d) - at the time of both the state interstate filings, Part 67), however, these rental expenses and investments were excluded from the interstate revenue requirement.

6. Ameritech also contends that it was proper to use an MMM factor produced by a basic study that was more current than the factor used in the state filing to compute revenue requirements for the subsequent interstate access filing. Ameritech says that most of the other differences between the two filings, such as the differences in directory expense and the customer premises equipment (CPE) expense adjustment, are attributable to the use of different test years for the state and interstate filings. The state tariff was based upon a September 1984 - August 1985 test year and the interstate tariff was based upon a June 1985 - May 1986 test year. Petition Attachment A at 2.

III. DISCUSSION

7. We are satisfied that most of the discrepancies in total investments, expense or separations factors used in the state and federal rate computations are attributable to timing differences. Some investment and expense will vary with different test years and separations factors will change from time to time to reflect changes in the usage and other factors that are used to compute the separations factors.

200-01 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

8. Such timing differences do not, however, explain Ohio Bell's decision to include SNFA investment and expense in the development of separations factors that were used to compute state rates and to exclude that investment and expense in the development of separations factors that were used to compute interstate rates. Such a procedure would produce different separations factors at the same point in time and would tend to defeat the basic purpose of the separations process - ensuring that uniform procedures are used to determine the investment and expense that is attributed to each jurisdiction. The use of inconsistent procedures would inevitably produce interstate and state separations factors that would not equal 100 percent at a given point in time.

9. Ameritech acknowledges that Ohio Bell's combined separations factors exceed 100 percent. Nonetheless, Ameritech claims that this did not affect interstate access rates. Petition Attachment at 8. We do not find this claim persuasive since interstate rates are, of course, developed by using these admittedly faulty separations factors. Moreover, Ameritech's assertion contradicts statements in the same attachment that the inclusion of SNFA investment and expense in the development of Ohio Bell separations factors would have reduced the projected interstate access expense by $3.014 million and would have reduced the projected interstate access net investment by $12.953 million. We accordingly reduce the expense disallowance from $9.1 million to $3.014 million and reduce the net investment disallowance from $28.7 million to $12.953 million.

10. We note Ameritech's contention that Ohio Bell excluded SNFA expense and investment from the computation of separations factors pursuant to Section 67.2(d) of this Commission's Rules, the predecessor of Section 36.2(d). Former Section 67.2(d) provided:

> Property rented to non-affiliates is usually to be included as used property of the owning company with the associated revenues and expenses treated consistently. In the event the amount is substantial, the property involved and the revenues and expenses associated therewith may be excluded from the telephone operations of the company. When required, the cost of property rented to non-affiliates is determined using procedures that are consistent with the procedures for the allocation of costs among the operations.

11. Ameritech has not attempted to demonstrate that any unusual circumstances would justify the exclusion of Ohio Bell's SNFA investment and

expense for purposes of developing jurisdictional separations factors.[4] Even if Section 67.2(d) could be construed to permit a carrier to elect to exclude SNFA investment and expense for that purpose, Ohio Bell must be deemed to have made its election when it included SNFA investment and expense in developing the separations factors Ohio Bell used to compute state rates. Accordingly, we reaffirm the Bureau's decision to disallow the investment and expense that is attributable to the use of an incorrect separations factor.

12. Ameritech also contends that we should vacate the Bureau's decision to require a refund or rate adjustment to reflect any disallowance because Ohio Bell's final Form 492 report indicates that Ohio Bell earned a 12.72 percent return during the relevant period. This Commission had prescribed a target rate of return of 12.75 percent at that time. We reject Ameritech's contention because the record does not adequately demonstrate that Ameritech's reported actual returns were based upon interstate separations factors developed differently from those used to compute the projected interstate access revenue requirement. Thus, Ameritech has failed to establish in this record that its reported actuals do not suffer from the same defects as its projections. Ameritech has not attempted to recalculate Ohio Bell's actual return to reflect the use of the correct separation factor. Such a showing would be necessary to justify reconsideration of the Bureau's decision to require Ohio Bell to submit a plan for refunds or rate adjustments.

13. The Bureau has stayed the requirement that Ohio Bell submit such a plan pending our decision on this petition for reconsideration. We are accordingly requiring Ohio Bell to submit its plan within 30 days of the release of this Order.

14. Accordingly, IT IS ORDERED that the Ohio Bell expense and net investment disallowances ARE MODIFIED as indicated above.

15. IT IS FURTHER ORDERED that the Ameritech Operating Companies submit a plan for refunds or rate adjustments within 30 days of the release of this Order.

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4 The inclusion of such investment and expense in the separations process does not mean that the interstate portion of SNFA investment and expense would be included in the revenue requirement for any access element. The provision of interstate SNFA facilities would be included in the interexchange category for purposes of the Part 69 access charge rules.

16. IT IS FURTHER ORDERED that the petition for reconsideration filed by the Ameritech Operating Companies IS GRANTED to the extent provided herein and is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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